

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,023

FILED MAY 28 1958

MILTON LEO MALLORY,

Joseph W. Stewart

CLERK
Appellant,

v.

926

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

199 [Filed in Open Court Dec. 10, 1956]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled November 1, 1956, Sworn in on November 6,
1956

THE UNITED STATES OF AMERICA)	Criminal No. 1208-56
v.)	Grand Jury No. 1651-56
MILTON LEO MALLORY)	Carnal Knowledge (22 D. C. C.
	2801)

The Grand Jury charges:

On or about November 22, 1956, within the District of Columbia, Milton Leo Mallory carnally knew and abused a female child named Shirley A. Mallory, who was then under sixteen years of age, that is to say, about eight years of age.

/s/ Oliver S. Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Paul May
Foreman.

200 [Filed Dec. 14, 1956]

* * * * *

PLEA OF DEFENDANT

On this 14th day of December, 1956, the defendant Milton Leon Mallory, appearing in proper person and without counsel, being arraigned

in open Court upon the indictment, the indictment being read to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

ALEXANDER HOLTZOFF

Presiding Judge

Criminal Court #One

* * * * *

201 [Filed April 9, 1957]

* * * * *

On this 9th day of April, 1957, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon after hearing further of the evidence, arguments of counsel and instructions by the Court, the two alternate jurors are discharged; thereupon the jury retires to consider their verdict; whereupon the said jury upon their oath say that the defendant, Milton L. Mallory, is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

CHARLES F. McLAUGHLIN

Presiding Judge

Criminal Court #2

* * * * *

202 [Filed April 12, 1957]

* * * * *

MOTION FOR JUDGMENT OF ACQUITTAL OR,
IN THE ALTERNATIVE, FOR A NEW TRIAL

Comes now the defendant in the above captioned cause by Thurman L. Dodson, his attorney, and moves this Honorable Court to grant a judgment

of acquittal or, in the alternative, for a new trial and, as reasons therefor, urges as follows:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the law.
3. That the verdict is contrary to the weight of the evidence.
4. That the Court erred in admitting the confession of the defendant.
5. That the court erred in admitting the statement allegedly made to the mother of the complainant.
6. That the Court erred in denying defendant's prayer which would have allowed the jury to disregard the confession if it was obtained in violation of the defendant's constitutional rights and in violation of law.
7. And for such other and further reasons as may be urged at the hearing of this motion.

/s/ Thurman L. Dodson

Attorney for Defendant

307 E. Street, N. W.
District 7-8000

205

[Filed May 24, 1957]

* * * * *

On this 24th day of May, 1957, came the Attorney of the United States; the defendant in proper person and by his attorney E. Lewis Ferrell, Esquire; whereupon the defendant's motion for judgment of acquittal or, in the alternative, for a new trial, coming on to be heard, after argument by counsel, is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

CHARLES F. MC LAUGHLIN

Presiding Judge

Criminal Court # TWO

* * * * *

207

[Filed June 20, 1957]

NOTICE OF APPEAL**Name and address of appellant****Milton Leo Mallory****D. C. Jail****Name and address of appellant's attorneys****Thurman L. Dodson, E. Lewis Ferrell****307 E Street, N. W.****Offense****Carnal Knowledge****Concise statement of judgment or order, giving date, and any sentence****Sentenced June 14, 1957, 2 to 7 years****Name of institution where now confined, if not on bail****D. C. Jail**

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

June 20, 1957**/s/ Milton Leo Mallory, Jr.****Appellant****/s/ Thurman L. Dason****/s/ E. Lewis Ferrell****Attorney for
Appellant.**

* * * * *

208 [Filed June 17, 1957]

On this 14th day of June, 1957 came the attorney for the government and the defendant appeared in person and by counsel Thurman L. Dodson

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

CARNAL KNOWLEDGE

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) years to Seven (7) years

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Charles F. McLaughlin
United States District Judge

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed July 10, 1957]

1 * * * * * *

Washington, D. C.
April 8, 1957

The above-entitled cause came on for hearing before the HONOR-
ABLE CHARLES F. McLAUGHLIN, United States District Judge, at
10:00 a.m.

APPEARANCES:

THOMAS FLANNERY,
Assistant United States Attorney,
Counsel for Government
THURMAN L. DODSON, Esq.,
Counsel for Defendant

* * * * * *

7 MR. FLANNERY: Call Shirley Mallory.

* * * * * *

8 THE COURT: God will punish you. Well, the Court feels that there
is sufficient basis to allow the little girl to take the oath; and the Clerk
will administer the oath.

* * * * * *

9 SHIRLEY A. MALLORY

* * * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

Q. Shirley, I want you to keep your voice up real loud so I can
hear you where I am standing. I am a little distance away from you now.
Speak up, so I can hear you, in a real loud voice, and tell these ladies
and gentlemen over here what your name is. A. Shirley Mallory.

* * * * * *

10 Q. You are nine years old? A Yes, sir.

* * * * * *

11 Q. * * * * Now, I want to remind you of a date in November --

A. Yes, sir.

Q. -- 1956. November the 22nd. Do you remember that day?

A. Yes, sir.

* * * * *

12 Q. Was it Thanksgiving Day? A. Yes, sir.

* * * * *

Q. Now, on that day, in the late afternoon -- A. Yes, sir.

Q. -- did you go to the movies? A. Yes, sir.

Q. About what time was that; do you remember? A. Came out at six-thirty.

Q. You came out of the movies at six-thirty. Was that in the evening? A. Yes, sir.

Q. All right. Did you go to the movies with some one? A. My brother.

Q. What is his name? A. Wilbert.

* * * * *

13 Q. Speak up real loud now, Shirley, so I can hear you way back here. Now, when you came out of the movies around six-thirty, did you go home? A. No, sir.

* * * * *

Q. Did you see your mother when you got out of the movies?
A. Yes, sir.

Q. Where did you see her? A. We had to go up on 12th Street.

* * * * *

Q. Where did you see her? A. On 12th Street.

14 * * * * *

Q. Just answer this, yes, or, no. Did you say something to your mother? A. Yes, sir.

Q. And then did you go somewhere after that? A. Yes, sir.

Q. Where did you go? A. I went on across the street.

* * * * *

Q. And where did you go across the street? A. I went over to Shirley's house.

Q. Shirley who? A. Shirley Curtis.

Q. Now, who is Shirley Curtis? A. She is --

Q. A friend of yours? A. Yes, sir.

Q. Now, do you know the address of the place where you went on 12th Street? A. Yes, sir.

15 Q. What address is that? A. 1223 - 12th Street.

* * * * *

Q. How far away is it from where you lived? A. We lived on 15th Street.

Q. I see. All right. Now, when you went over to 1223 12th Street, did you see someone over there? A. Yes, sir.

16 Q. Who did you see? A. I saw -- Shirley, she was taking a bath.

Q. Shirley was taking a bath? A. Yes, sir.

Q. Then what else happened over there? Did you see anyone else? A. Yes, sir.

Q. Who did you see? A. Leo.

* * * * *

Q. Leo who? A. Mallory.

Q. Leo Mallory. Now, Shirley, do you see Leo Mallory today in this room? A. Yes, sir.

17 Q. Step down and point to him; will you? A. (Indicating).

Q. Walk over closer to him, wherever he is, and just point to him.
A. (Indicating).

Q. Which one of those gentlemen now? A. (Indicating).

MR. FLANNERY: May the record indicate, Your Honor, that the witness has pointed to the Defendant in this case?

THE COURT: It may.

MR. FLANNERY: All right now, you just take a seat back there.

(Whereupon the witness resumed the witness stand.)

BY MR. FLANNERY:

Q. Now, when you saw this Defendant, Leo Mallory, what happened?
A. Shirley told me to see about the chicken -- and he didn't have the thing -- went out the back.

* * * * *

18 Q. All right. What, if anything, happened between you and Mallory? A. He took the keys and went out the door; and when I was going

upstairs looking at some little children playing, he grabbed me.

Q. He went out the door and took a key; is that right? A. Yes, sir.

Q. Then where did you go? A. I was going up the stairs.

Q. Did you leave the apartment where Shirley and Mallory had been? A. Yes, sir.

Q. And where did you go then? A. I was going back on across the street. I told Shirley, 'bye.

Q. I didn't hear that. You left the apartment where you had been?

19 A. Yes, sir.

Q. Now, tell us so we can hear you way back here, where did you go? A. I was fixing go back over across the street where my mother was; and I was looking at some little children playing.

Q. You say you were going back where your mother was? A. Yes, sir.

Q. Did you go back where your mother was at that time? A. No, sir.

Q. Or didn't you? What happened? A. He grabbed me in that room.

Q. Who grabbed you? A. Leo.

Q. And by Leon, you mean this man there? A. Yes, sir.

Q. All right. Now, where were you when he grabbed you? A. I was standing in the hall looking at some children playing.

Q. You were in the hallway where some children were playing; is that right? A. Yes, sir.

20 Q. In the same house, 1223? A. Yes, sir.

Q. All right. Now, when he grabbed you, then what happened?
A. He pulled down my pants.

Q. Did you go somewhere? A. In the room.

Q. In a room. Where was this room? What floor was that on?
A. First.

Q. The first floor? A. Yes, sir.

Q. And you went into the room with the Defendant; is that right?

A. Yes, sir.

Q. Now, what happened when you got into this room? A. When I got in there, he pulled my pants down and got on top of me.

* * * * *

Q. Say that again. The lady back here didn't hear you. Speak up loud, Shirley. A. I say, when I got in the room, he pulled down my panties and got on top of me.

21 Q. All right. And what did he do when he got on top of you? A. He stuck his thing in me.

Q. He did what? A. Stuck his thing in me.

Q. What do you mean by that? A. His thing where he go to the bathroom.

Q. His thing that he goes to the bathroom with? A. Yes, sir.

Q. What did he do with that? A. Stuck it in my thing where I go the bathroom with.

Q. All right. Did he put it in you? A. Yes, sir.

* * * * *

22 Q. Tell these people in your own words what this man did to you. What did he do, if anything? A. He got on top of me and went up and down.

Q. Tell them again what he did before he went up and down. A. He stuck his thing in me where he go the bathroom with.

Q. Where did he put his thing where he went to the bathroom? A. In me where I go to the bathroom.

Q. Did you say, in you where you go to the bathroom? A. Yes, sir.

Q. And then you say he went up and down? A. Yes, sir.

Q. You said that. All right. Now, how long did he do that, if you know? Let me ask you this: Do you know how many times he went up and down on you? A. No, sir.

Q. If you know. You don't? A. No, sir.

23 Q. All right. And did anything happen when he went up and down on you? A. Yes, sir.

Q. What happened? A. I start calling Shirley.

Q. I didn't hear you. A. I start calling Shirley.

Q. You started calling Shirley? A. Yes, sir.

Q. All right. And then what happened? A. Then didn't nobody answer; and I kept hollering.

Q. What was that now? A. Didn't nobody answer; and I kept hollering.

Q. Nobody answered? A. No.

Q. All right. And then what did you say after that? I didn't hear you. A. And I kept hollering.

Q. You kept on? A. Yes.

Q. Then what happened? A. My mother told my brother to come on across the street to see where I was; and I went down and went to the--

* * * * *

24 Q. Now, what happened then? Tell us again real loud. A. I was coming out the room. I had been gone across the street, and my mother tell me to come.

Q. Let me interrupt you for a minute. Did there come a time when he finished going up and down on you? A. Yes, sir.

Q. Then what happened? What did he do then? A. Gave me twenty-three cents.

Q. This man gave you twenty-three cents? A. Yes, sir.

Q. And then what did you do and what did he do? A. He put me out of the room; and he stayed in there.

Q. I didn't hear that. A. He put me out of the room; and he stayed in there.

Q. He put you out of the room and he stayed in there. All right. Now, then, where did you go when you got out of the room? A. I was going over across the street; and my mother saw me pulling at my clothes.

Q. I didn't hear that. A. I say, I was going over across the street; and my mother saw me pulling up my clothes; and she asked me where have I been.

25

Q. You saw your mother? A. Yes, sir.

Q. And she asked you where you had been; is that what you said?

A. Yes, sir.

Q. Just answer this, yes, or, no. Did you tell her where you had been? A. Yes, sir.

Q. And then what happened after that? A. She went and called the police.

Q. All right. Do you remember a little later that evening, did you go over to the hospital? Do you remember that? A. Yes, sir.

Q. Did a doctor look at you? A. Yes, sir.

Q. Were you wearing panties that day, little panties? A. Yes, sir.

Q. Were you wearing a little slip? A. Yes, sir.

MR. FLANNERY: Mark these 1 and 2.

THE CLERK: Government's Exhibit No. 1, marked for identification.

26

(Whereupon the said panties were marked Government's Exhibit No. 1, for identification.)

THE CLERK: Government's Exhibit No. 2, marked for identification.

(Whereupon the said slip was marked Government's Exhibit No. 2, for identification.)

BY MR. FLANNERY:

Q. Shirley, I want you to look at this little pair of panties here, which are marked as Government Exhibit No. 1, for identification. Look at that little pair of panties. Are they the ones that you were wearing on that day? Take a look at them. A. Yes, sir.

Q. Any way you can identify them; or do they just look like the ones you were wearing? Are they the color you were wearing? A. I had white.

Q. What? A. White.

Q. You say, you had on white ones? A. Yes, sir.

Q. Did you have on these that day, pink ones? A. Yes, sir.

27 Q. You had these on. Take a look at this little slip here. This is No. 2, for identification. Does that look like the slip you were wearing that day? A. Yes, sir.

Q. Now, did I ask you how old you are? How old are you?
A. November.

Q. In November, last November, how old were you, eight or nine?
A. Eight.

Q. Now, 1223 12th Street is in Washington, D. C.; isn't it?
A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. DODSON:

Q. Shirley, will you tell us how long you have known Leo? Speak up so everybody can hear you. A. I don't know how many years.

Q. It has been a long time? A. Yes, sir.

Q. And at one time, you lived in Leo's house; didn't you? A. Yes, sir.

28 Q. And he has known you since you were a baby; has he not?
A. I don't know about that.

Q. Well, you used to live in his house where he lived, didn't you, with his father? A. Yes, sir.

Q. How long did you live at his house? A. I don't know.

Q. You don't know. Well, for a long time, was it? A. Yes, sir.

Q. Keep your voice up. And Leo used to see you dress and undress all the time; didn't he? A. Yes, sir.

Q. And at no time did he ever bother you; did he? A. No, sir.

Q. Now, you just answered Mr. Flannery, when he showed you these little panties, and you said that you thought that you had on white panties that day? A. I don't know for sure.

Q. You don't know for sure. So you don't know for sure whether these are the panties you had on then or not; do you? A. No, sir.

29 Q. And you don't know whether this slip is the slip that you had on then or not; do you? A. That is the slip.

Q. That is the slip. But you are not sure about the panties?

A. No, sir.

* * * * *

30 Q. Now, on this day that you came back from the theatre, was it dark when you came back? A. Yes, sir.

* * * * *

Q. And was anybody with you other than your brother when you went to the theatre? A. No, sir.

31 Q. And at that time, when this thing happened in November of last year, where were you living? A. I was living on 15th Street.

Q. What number? A. 1722 15th Street.

* * * * *

Q. Where were you supposed to go when you got out of the theatre? A. I was supposed to go to 1226 12th Street. She said for us to come over there; she would be over there waiting for us.

Q. You were supposed to meet your mother at 1226 12th Street, which is right across the street from 1221; is that right? A. Yes, sir.

32 1223.

* * * * *

Q. Did you go straight to your mother when you came out of the theatre? A. Yes, sir.

Q. And how long did you stay with your mother when you came back from the theatre? A. Just a little while.

Q. And then you asked her if you could go across the street? A. That is right.

Q. To 1223? A. Yes, sir.

Q. And who did you go over there to see at that time? A. I went over there to see Shirley.

33 * * * * *

Q. Do you know her last name? A. Shirley Mae Curtis.

* * * * *

Q. Is she a big girl or is she a small girl like you? A. A big girl.

Q. She is a big girl. And when you got there, did you go into the

basement of the apartment? A. She lived down in the basement.

Q. She lived in the basement? A. Yes, sir.

Q. Did you see her? A. No, sir; she was taking a bath.

Q. But did you see her? A. No, sir.

Q. And who else was down in the basement at this time? Did your brother go over there with you? A. No, sir.

Q. Did anybody go with you? A. No, sir.

34 Q. And how long did you stay in the basement after you got over there that day? A. I stayed over there a little while and then I was going to go back home; I told her, 'bye.

* * * * *

Q. Told who good-bye? A. Shirley.

Q. Was she still in the bathroom taking a bath then? A. Yes, sir.

Q. Had she come out? A. No, sir.

Q. Where was she when you said good-bye to her? A. In the bathtub.

Q. In the bathroom? A. Yes, sir.

Q. And the door was closed? A. Yes, sir.

Q. And you talked to her through the closed door? A. Yes, sir.

Q. Where was Leo at that time? A. He was in the back in the room sitting on the cot.

Q. He was back in his room sitting on the cot? A. Yes, sir.

35 Q. Did you go back into his room after you finished talking with Shirley? A. No, sir. I fixing to go home.

Q. You were fixing to go home. Did you then leave the basement? A. Yes, sir.

Q. Did you go out by yourself? A. Yes, sir.

Q. And did you get out of the building? A. No, sir.

Q. You got on the first floor? A. Yes, sir.

Q. And what happened when you got to the first floor? A. I was looking at the children playing.

Q. Were the children in the hall? A. Yes, sir.

Q. What? A. Yes, sir.

Q. How many children were there? A Two.

Q. Were they boys or girls? A. One was a boy and one was a little girl.

Q. And while you were looking at the little children playing, how close did you get to those children? A. I was up close to them.

36 Q Right by them? A. Yes, sir.

Q. Did you know those children? A. Yes, sir.

* * * * *

Q. And how long did you talk with them? A. I talked to them a little while.

Q. A little while? A. Yes, sir.

Q. And then what did you do? A. I was still standing there looking at them playing.

Q. I don't understand you. A. I said, I was still standing there looking at them playing.

Q. You were still standing there looking at them playing. What kind of game were they playing? A. They was running through the hall.

Q. What? A. They was running through the hall.

37 Q. I see. Did you join with them in running through the hall?

A. No, sir.

Q. And then what happened? A. Leo drugged me in the room.

Q. Did Leo come upstairs at the same time that you came upstairs? A. No, sir.

Q. He came up afterwards? A. Yes, sir.

Q. Did these children see him take you into the room? A. No, sir.

* * * * *

Q. Where were the children when he took you into the room?

A. They was back in the hall by the door.

Q. By the front door that you go into the building? A. Yes, sir.

Q. And this door that you went into is at the other end of the hall?

A. Yes, sir.

Q. Was the hall lighted? A. Yes, sir.

Q. Was it a bright light in the hall? A. Yes, sir.

38 Q. And when he took you into the room, did you holler? A. Yes, sir.

* * * * *

Q. Let us know how loud you hollered. A. I hollered real loud.

* * * * *

Q. Did the children come up there to see what was the trouble?

A. They had gone in their house then.

39 Q. They had gone in their house then. When Leo took you in this room, how long did you stay over there? A. Long time.

Q. A long time? A. Yes, sir.

Q. When you say a long time, could you give us some idea what you consider a long time? A. It was a good little while.

Q. Do you realize how long about ten minutes is? A. Yes, sir.

Q. Do you think it was as long as ten minutes? A. Yes, sir.

Q. Was it longer than ten minutes? A. Yes, sir.

Q. How long would you say? How long do you think you have been on the stand this morning? Do you think you have been on the stand an hour? A. No, sir.

Q. Do you think that you stayed in the room about as long as you have been on the stand this morning? A. Yes, sir.

Q. About that long? A. Yes, sir.

40 Q. And while you were in the room, did Leo talk with you? A. Yes, sir.

Q. How did he appear to you that day? Did he seem as he always was? A. No, sir.

* * * * *

Q. Did he act like he was himself? A. No, sir.

* * * * *

Q. How did he act? You tell us, so that these ladies and gentlemen here and His Honor can hear you. Did he talk to you before he did anything to you? A. No.

Q. When he is supposed to have done something to you, where were you? Were you on the floor? A. Yes, sir.

Q. How did you get on the floor? A. He put me down there.

Q. What? A. He put me down there.

41 Q. He put you down on the floor? A. Yes, sir.

Q. And did you try to get up? A. Yes, sir.

Q. I see. And after he had finished doing what you said he did to you, what happened then? Did you walk out of the place yourself?

A. No, sir.

Q. Did he go out with you? A. No, sir.

Q. How did you get out of the room? A. He put me out.

Q. What? A. He put me out.

Q. How did he put you out? A. He opened the door and put me out.

Q. He went to the door; and did he push you? A. Yes, sir.

Q. And did you holler at that time? A. No, sir.

Q. When you got out in the hall that you had seen the children, were the children out there when you went out that time? A. Yes, sir.

Q. They were still out there? A. Yes, sir.

42 Q. And did you go back downstairs or did you go on out of the building then? A. I went on out of the building.

Q. And where did you see your mother with relation to the building? Did you see her in the building, or did you see her outside of the building? A. She was over across the street in the building, looking out the window.

Q. And did you go across the street where your mother was? A. Yes, sir.

Q. Now, when did you start fixing your clothes, that you talked about? A. When I was coming out the door, I was fixing my clothes.

Q. Coming out what door? The apartment door? A. Yes, sir.

Q. Do you mean out of the room where you had been with Leo or outside of the building? A. Outside the building.

Q. I see. And it was that time that your mother came out to you? A. Yes, sir.

Q. And you had a little conversation then with your mother?

43 A. Yes, sir.

Q. Now, when you lived at Leo's house, where did you sleep?

A. In the front room.

Q. And where did Leo sleep? A. He weren't living there then.

Q. He wasn't living there at that time. And was your mother living there too, when you lived there? A. Yes, sir.

Q. But you say that Leo had seen you dress and undress many times before? A. Yes, sir.

Q. And had never bothered you? A. No, sir.

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45

WILMA LITTLEJOHN

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DIRECT EXAMINATION

BY MR. FLANNERY:

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Q. Where do you live? A. I live at 1722 15th Street, N.W.

Q. That is in the District of Columbia? A. Yes.

Q. All right. On November 22, 1956, last November, did you live there? A. Yes, I did.

Q. Now, on that date, November 22, 1956, it was Thanksgiving Day. A. That is right.

Q. Did there come a time when one of your children, Shirley Ann went to the movies? A. Yes.

Q. About what time was that? A. She returned from the movies about six-thirty in the afternoon.

Q. She returned about six-thirty? A. That is right.

47

Q. Do you remember about what time she went to the movies?

A. About, I think it was, between one and one-thirty.

Q. Now, Shirley Ann Mallory is your daughter; isn't she?

A. That is right.

Q. How old is she? A. She is nine now, but at the time she was only eight.

Q. Do you remember her birthday? February 26, 1948.

Q. Forty -- what? A. Forty-eight.

Q. Now, after Shirley had been to the movies, did she come home? Is that it? A. She came across the street. I was across the street from

my brother's house.

Q. Where was that? A. 1226 12th Street, N. W.

Q. In the District of Columbia? A. Yes.

Q. Now then, when she came to that address, 1226 12th Street, did she have a conversation with you at that time? Just, yes, or, no.

48 A. Yes.

Q. And as a result of that conversation, did you give her permission to go somewhere? A. To my brother's house, 1223 12th Street, N. W.

Q. You gave her permission to go to 1223 12th Street. Is that right across the street? A. That is right.

Q. You say your brother lives over there? A. Yes.

Q. Who is your brother? A. Mr. Luther Mallory.

Q. Luther Mallory? A. (Witness nods assent.)

Q. Are you related to Milton Leo Mallory, the Defendant in this case? A. Yes, I am.

Q. Do you see him here today? A. Yes,

Q. Point him out for the record. A. (Indicating).

Q. Which one of these gentlemen? A. In the blue suit.

Q. In the blue suit. All right. What is your relationship to him?
A. His aunt.

Q. You are his aunt? A. That is right.

49 Q. All right. Now then, as I follow your testimony, you gave your little daughter, Shirley Ann, permission to go over to 1223 about six-thirty p. m. A. That is right.

Q. When is the next time you saw her? A. Between a quarter to seven and ten to seven.

Q. Speak up loud now. A. About ten to seven.

Q. About twenty minutes later, would you say? A. Or fifteen, something like that.

Q. All right. Now, where did you see her? A. She was coming out the door from 1223, and she was fixing her clothes.

Q. All right. Now, I want you to just answer this question, yes, or no. Did she have a conversation with you? A. Yes.

Q. Now, because of or as a result of that conversation you had with Shirley Ann, what did you do? A. I went down the basement at 1223 and I told Shirley what had happened.

Q. I don't want you to repeat any conversation you had with anyone; but you say you went to see Shirley? A. Yes.

Q. Who is Shirley? A. Shirley Curtis.

50 Q. And you had a conversation with her? A. Yes.

Q. All right. Now, what, if anything, was the relationship between Shirley Curtis and this man Mallory, the Defendant? A. They was common law wife and husband.

Q. Common law wife. All right. Now then, after talking to Shirley, the common law wife of this Defendant, what did you do? A. I called the policeman.

Q. All right. Did the police come and see you then? A. Yes.

Q. And then did there come a time after that, after you saw the police, that you saw this Defendant, Milton Leo Mallory? A. Yes.

Q. When was that? A. That was after the police were around.

Q. What? A. After the policemen arrived.

Q. After the policemen arrived, you say? A. That is right.

Q. What time was that when you saw him after the policemen arrived? A. I think about a quarter -- about ten after seven, I should say.

51

Q. About ten after seven, you say? A. Yes.

Q. Now then, at that time, did you hear this Defendant say anything about Shirley? A. Yes.

Q. At ten after seven? A. At first he denied -- he denied it that night.

Q. At first he did what? A. He denied it that night.

Q. Denied doing anything to Shirley? A. Yes.

Q. All right. Now then, the next day, November 23, did you go down to Police Headquarters? A. Yes.

Q. And about what time was that? A. Nine o'clock.

Q. Nine o'clock in the morning? A. That is right.

Q. Did your little daughter, Shirley, go with you? A. Yes.

Q. Who else was there at that time? A. Shirley Curtis, and my mother, and Shirley Ann, and myself.

52 Q. Shirley Curtis, that is the common law wife of this man?

A. Right.

Q. Your mother? A. That is right.

Q. Is that Lucy Mallory? A. That is right.

Q. And your little daughter, Shirley Ann? A. Yes.

Q. And yourself? A. That is right.

Q. And there were some policemen there; is that right? A. That is right.

Q. All right. Now, at that time, did you hear this Defendant, Milton Leo Mallory, say anything about Shirley, your little daughter?
A. Yes.

Q. What did he say? A. He said that -- he said she told him to give her a quarter and she would give him a little bit.

Q. I didn't hear that. A. She told him to give -- she told him to give her a quarter and he would give her -- excuse me. He told her --

53 Q. Take your time. A. I am nervous.

Q. What did he say? A. She told him to give her a quarter and he would give her -- she would give him a little bit.

Q. Is that what he said?

THE COURT: What did she say she would give him? I didn't hear that.

MR. FLANNERY: A little bit.

BY MR. FLANNERY:

Q. Then what else did he say? A. He didn't have a quarter, so he gave her twenty-three cents.

Q. What did he say he did? A. He didn't pull her in the room. Said she went in her own self; and he didn't pull her clothes down; she pulled them down herself.

Q. And then what did he say he did? A. He spread some paper on the floor and she lied down on it and pulled her pants down; and he got on her.

Q. And what did he say he did? A. He had intercourse with her.

Q. He said that down at Police Headquarters? A. Yes.

* * * * *

54

CROSS EXAMINATION

BY MR. DODSON:

Q. Who was present when these remarks were made by Leo, Mrs. Littlejohn? A. My mother, and Shirley Curtis, and Shirley Mallory, and myself.

Q. And were the police officers there? A. Yes.

Q. Had he been carried to Court at that time? A. That was the hearing, the first hearing.

Q. What? A. I think that was the first hearing.

Q. Was that at the Court House or Police Headquarters? A. Police Headquarters.

Q. He hadn't been carried to Court at that time? A. I disremember how it was.

Q. This was nine o'clock in the morning? A. Yes, it was.

Q. And it happened at the Police Headquarters. Did you go to Court after that? A. No; we didn't go to Court.

Q. You didn't go to Court at all? A. Not that day.

Q. What? A. Not that day, we didn't.

55

Q. You didn't go to Court that day. Didn't you go to the Police Court or the United States Commissioner? A. I don't know anything about Court.

Q. But at that time, you went straight to the Police Headquarters? A. I guess that is where it was. I don't know.

Q. Were the detectives around there? A. I think so.

Q. And is that the time that he signed the statement? A. Yes.

Q. And you knew that was not the Court House? A. It wasn't the Court House.

Q. Did he have a lawyer with him at that time? A. The lawyer wasn't in there. I don't know if he had one.

Q. There was no lawyer there. And what time do you say he was locked up the night before? A. About ten after seven, I think,

when the policemen arrived.

Q. About ten after seven. They took him away that night with them; didn't they? A. Yes.

Q. This was nine o'clock the next morning? A. Yes.

56 Q. And did you hear anybody tell him that he didn't have to make a statement if he didn't want to make one? A. I disremember now.

Q. Did anybody tell him that he had a right to have a lawyer at that time, that he did not have to make a statement if he did not choose to make one? A. I don't remember.

Q. Well, as a matter of fact, you know you didn't hear anybody tell him that; don't you? A. I don't think I did.

* * * * *

58 Q. One. So under those circumstances wasn't much privacy that you would have done there; was it? A. No.

Q. And how long did you live like that down there prior to the time you moved over to 17th Street? A. I came here in August.

Q. In August. You left in August? A. I came here to live in August from South Carolina.

Q. Came to Washington in August of '56? A. Yes.

Q. And did you come directly to Mr. Luther Mallory's place at 1223 12th Street? A. Yes.

Q. And how long did you remain there? A. Until November -- let me see -- it was about the first of November.

Q. So you had just been gone a little less than a month when this incident is supposed to have happened? A. Yes.

* * * * *

59 MR. DODSON: If Your Honor please, I would like to approach the bench.

THE COURT: You may.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MR. DODSON: I would like to move at this time to have the testimony with respect to this alleged confession stricken on two grounds:

First of all, the witness says that --

First of all, on the theory of the McNabb decision -- man arrested around seven o'clock; this was nine o'clock the next morning; hadn't been carried to the Commissioner.

On the second ground, she says no safeguards given him; wasn't told anything about his rights at all.

THE COURT: She said she didn't hear them.

MR. DODSON: I think her final statement was, when I asked her, you know very well it wasn't, she said, yes.

MR. FLANNERY: No case at all that he has to be advised. As a matter of fact, the cases hold otherwise.

THE COURT: The Court will note that objection. The Court will overrule the objection.

MR. DODSON: Thank you.

THE COURT: All right.

(Whereupon counsel resumed their places at the trial table and the following proceedings were held in open Court:)

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MYRA C. WESLEY

* * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

* * * * *

Q. You are a policewoman; aren't you? A. That is correct.

Q. On November 22, 1956, to what squad or bureau on the Police were you attached? A. The Women's Bureau.

Q. On that date, November 22, 1956, the evening hours, did there come a time when you saw one Shirley Ann Mallory? A. Yes.

Q. About what time was that? A. I don't know exactly; but it was -- I was working four to twelve.

Q. Have you an approximate idea of the time? A. I would say it was after seven.

Q. All right. Under what circumstances did you see Shirley Ann

61 Mallory? A. Shirley Ann Mallory was brought to the Women's Bureau by the Sex Squad to be taken to D. C. General Hospital for an examination.

Q. Did you take Shirley Ann Mallory to the District of Columbia General Hospital? A. I did.

MR. FLANNERY: Mark this envelope No. 3, would you, please.

THE CLERK: Government's Exhibit No. 3 marked for identification.

(Whereupon the brown envelope was marked Government's Exhibit No. 3, for identification.)

BY MR. FLANNERY:

Q. I want to show you now what has been marked as Government's Exhibit No. 3, for identification, that brown envelope. Can you identify that? A. Yes, I can. This is the envelope that I put panties and a slip that was taken from Shirley Ann Mallory at the D. C. General Hospital. This is my handwriting.

Q. Your handwriting on the envelope? A. That is correct.

62 Q. All right. Now, then, I will show you a pair of panties, Government's Exhibit No. 1, for identification, and a white slip, Government's Exhibit No. 2, for identification. Do they resemble the panties and the slip that you put into that envelope, No. 3? A. Yes, they do.

Q. All right. Now, tell His Honor and the Jury the circumstances under which you got possession of the panties and of the slip, and what caused you to put them in the envelope? A. I took Shirley Ann Mallory to the D. C. General Hospital to be examined to see if she had been sexually assaulted.

She was examined at the hospital; and I took the panties and the slip, because there were some stains on them.

Q. All right. Did you take them from her or see her take them off? A. I did. She was in the same room with me. I have to be present. I took them off; put them in my purse until I got to the Women's Bureau; put them in a brown envelope; wrote on it; and left it at the switch-

board at the Women's Bureau for the Sex Squad.

Q. This envelope which you have identified, Government's No. 3, did you seal it when you left it there? A. I did. I sealed it with Scotch tape.

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63

BYRD H. HALL

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DIRECT EXAMINATION

BY MR. FLANNERY:

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Q. You are a member of the Metropolitan Police Force, attached to the Sex Squad; are you not? A. I am.

Q. And on November 22, 1956, you were so employed; were you not? A. I was.

Q. Now then, directing your attention to November 22, 1956, did you have occasion to arrest the Defendant in this case? A. I did.

Q. At what time? A. Shortly after 7:53 is when we got the radio call; and it took us approximately three to five minutes to arrive on the scene.

* * * * *

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Q. Don't go into any conversation or instructions that you had. But you did respond to 1223 12th Street, N.W.? A. That is correct.

Q That is in the District of Columbia? A. It is.

Q. All right. Now, when you responded there shortly after 7:53 p.m., as you have testified, what happened? What did you do? A. Upon arrival, we parked the car down the street a short ways from this address. There was no parking space available.

At that time, we observed a man, the Defendant, lounging against the fence in front of premises 1219 12th Street, N.W.

As we got out of the car, the way he was lounging there attracted our attention; and we questioned the Defendant as to what his name was and where he lived.

When he stated that he lived at 1223 12th Street, in the basement apartment, we asked him to accompany us up the street to that

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address. And at that time, we were met in front of the apartment house by the mother of the complainant, who immediately identified him as the person to whom she had made the complaint about.

Q. All right. Now then, what did you do at that time? A. At that time, we took the Defendant and accompanied by the mother of the complainant and proceeded to the basement apartment of 1223 12th Street.

Q. All right. What did you do there in the basement apartment of 1223 12th Street? A. At that time, I talked to the complainant in this case, her mother, and another woman, Shirley Curtis, who identified herself as the common law wife of the Defendant.

Q. All right. Let's don't go into that conversation; but after talking to them, what did you do? A. As a result of this conversation, a search was made of the Defendant, and in the right-hand sport jacket pocket which he was wearing, two keys attached to a cardboard card were taken and held as evidence.

MR. FLANNERY: Mark that with the next number.

THE CLERK: Government's Exhibit No. 4 marked for identification.

(Whereupon the keys attached to cardboard were marked Government's Exhibit No. 4, for identification.)

67

BY MR. FLANNERY:

Q. Now, Detective Hall, I show you what has been marked as Government's Exhibit No. 4, for identification, a green piece of cardboard attached to which are two keys. Can you identify that? A. Yes, sir, I do.

Q. How do you identify it? A. My initials and the date, "11/22/56" are inscribed on the lower end.

Q. All right. Now then, you say you recovered these two keys, Government's Exhibit 4, for identification, from the Defendant? A. I did.

Q. Now then, what, if anything, did you do with respect to these keys? A. I questioned the Defendant in the apartment at that time as to these keys. I had information that they were supposed --

Q. Better not go into that.

MR. DODSON: Object.

BY MR. FLANNERY:

Q. You questioned him. All right. Then what did you do?

A. As a result a scout car had responded, and I requested that they remove the Defendant to Police Headquarters for further investigation of
68 this complaint. And then accompanied by the complainant and her mother, we proceeded to the scene of the alleged assault, which was at the top, the rear of the first floor of this apartment house, Apartment No. 3.

Q. At 1223 12th Street? A. 1223 12th Street.

Q. Northwest, in the District of Columbia? A. That is correct.

Q. Then what did you do there? A. We entered the apartment with the little girl, the complainant, showing us or directing us to where the alleged assault was supposed to have taken place.

Q. All right. A. She directed us to a bedroom in the middle of this apartment. The apartment was unfurnished and unlighted. By using flashlights, she pointed the scene in the bedroom out; and at that location, I observed a cigarette lighter laying on the floor, and also several lumps of coal on the floor.

MR. FLANNERY: Mark this.

THE CLERK: Government's Exhibit No. 5 marked for identification.

(Whereupon the said cigarette lighter was marked Government's Exhibit No. 5, for identification.)

69 BY MR. FLANNERY:

Q. I show you Government's Exhibit No. 5, for identification, this cigarette lighter. Can you identify that? A. This is the lighter that I recovered at the scene.

Q. Any particular way you identify it? A. My initial "H" scratched on it.

Q. All right. What else did you do there at that place? A. We

made a thorough search of this room; and, as I said, several lumps of coal were on the floor of an otherwise immaculate apartment. Also, in the kitchen sink were found numerous old newspapers.

* * * * *

70 Q. Officer Hall, when we recessed, I believe you had reached the point in your testimony where you said you saw some newspapers in the sink? A. Yes, sir.

Q. All right. Then please proceed with your testimony. What did you do after that? A. After completing the inspection of the apartment where the alleged offense occurred, we took the complainant and her mother in the Sex Squad cruiser and transported them to the Women's Bureau, where we turned them over to Policewoman Wesley of the Women's Bureau to be transported to the hospital.

Q. All right, then what? A. Prior to that, the Defendant in this case had been transported in Scout 23 to Police Headquarters.

We then proceeded to Police Headquarters; and at that time, I took the Defendant from the cellblock to the office of the Sex Squad and prepared a line-up sheet; and also a prisoner interview sheet; and also
71 questioned him relative to this alleged offense.

Q. Any questions about the cigarette lighter? A. I questioned him regarding the cigarette lighter. He identified it as his, and stated that he had lost it some time ago. He was unable to approximate the length of time when he had lost it.

Q. All right. Then what else was done that night? A. After completing the questioning and making the necessary sheets, I later took him to the Identification Bureau, where four tests were performed upon his penis for the presence of blood by Private John Singleton of the Identification Bureau.

Q. All right. Was there anything further done that night in connection with this case? A. After the completion of this test, the Defendant was returned to the cellblock; and I went to the Women's Bureau to the switchboard, and picked up a medical report which was written by the doctor who had examined the child, and also a manilla envelope containing certain evidence.

Q. I will show you what has been marked as Government's Exhibit No. 3, for identification, this manilla envelope. Can you identify that?

A. This is the envelope that was attached to the medical report and sealed at the time.

Q. It was sealed at the time? A. Yes, sir.

Q. Did you open it or let it remain sealed? A. No, sir; I did not open it.

Q. All right. Then what did you do with this envelope, Government's Exhibit 3, for identification, and its contents? A. I returned that envelope to the office, Sex Squad, and locked it in my desk overnight.

Q. Did there come a time subsequently that you did something with this envelope and its contents? A. About three-thirty the following day, I turned that envelope over to Detective Yuter, who had been previously assigned to the further investigation of the case.

Q. You mean you turned the envelope and its contents over to Yuter? A. That is correct.

Q. Was it still sealed when you turned it over? A. It was.

Q. At the time you arrested this Defendant, what was his condition as to sobriety? A. The Defendant had been drinking at the time of his arrest. He had in one of his pockets a pint of wine, approximately half consumed.

Q. Would you say that he was very drunk? A. No, sir, I would not.

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CROSS EXAMINATION

BY MR. DODSON:

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Q. Was he incoherent in his answers to the questions to you?

A. Yes, sir.

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DIRECT EXAMINATION

BY MR. FLANNERY:

* * * *

Q. You are a member of the Metropolitan Police Force attached to the Sex Squad; are you not? A. That is correct, sir.

* * * *

Q. You were a member of the police force attached to the Sex Squad on November 22, 1956; were you not? A. Yes, sir, I was.

Q. Did you on that date, November 23, 1956, assist in the investigation of this case? A. Yes, sir, I did.

75 Q. Tell His Honor and the Jury what you did in this case? A. On the morning of the 23rd of November, I first saw the Defendant at about 9:00 a. m.

We was acquainted with the complaint that had been received the night before; and after reading over the complaint, we talked to the Defendant.

Q. Now, was anyone present when you talked to the Defendant?
A. Sergeant Mackie was with me.

Q. All right. Now, did you talk to him about this case? A. Yes, sir.

Q. All right. Just answer this, yes, or, no.
Did he make a statement in connection with this case? A. Yes, sir.

Q. Now, before he made that statement, were any promises made to him? A. No, sir.

Q. Did anyone threaten him in your presence? A. No, sir.

Q. Did you threaten him? A. I did not.

Q. All right. What did he say in connection with this case at
76 around 9:00 a. m., November 23? A. We talked with him for a very brief time, a matter of a few moments; wasn't much over five, ten minutes; and we asked the Defendant if he had done as this girl had

alleged he had done, did he have intercourse with this girl; and he said that he had, but that she had solicited him. In effect, she had asked him if he wanted a little bit for a quarter; and he told her that he did, that he would give her a quarter.

Said they went upstairs in the apartment at 1223 12th Street, N. W.; went to Apartment 3; spread some newspaper on the floor in that particular apartment; and as he reached in his pocket, he didn't have a quarter. He said he had twenty cents, or a little better than that; and he give her that.

And he says, the girl laid down; and he had intercourse with her.

Q. All right. And is that about all he had to say at that time?

A. Well, Sergeant Mackie at that time asked him if he knew how old the girl was. He said, well, eight or nine years old.

Q. Then what was done next? A. He was asked if he cared to make a statement at that time; and we told him if he did the police lady would take the statement down in writing.

77 At that time he intimated that he was willing and would give a statement.

Q. All right, so then what was done? A. At that time a statement was taken by a policewoman, Joyce Plath, who is assigned to the Sex Squad.

Q. Taken down in typewritten form? A. Yes, sir.

THE COURT: What was the name of the officer?

THE WITNESS: Joyce P-l-a-t-h, Your Honor.

BY MR. FLANNERY:

Q. Do you have that statement with you? A. Yes, sir, it is here in the jacket. Here it is.

MR. FLANNERY: Mark this.

THE CLERK: Government's Exhibit No. 6, marked for identification.

(Whereupon the said statement was marked Government's Exhibit No. 6, for identification.)

MR. DODSON: Here you are, Mr. Flannery.

BY MR. FLANNERY:

Q. Now, Detective Yuter, I will show you what has now been marked as Government's Exhibit No. 6, for identification. What is that?

A. This is a written and signed confession by the Defendant.

78 Q. Is that the written statement about which you have just testified in your testimony? A. That is correct, sir.

Q. All right. Now, then, after this statement was typed up, did the Defendant sign it? A. Yes, sir, he did.

Q. Was it read to him? A. It was read to him by my partner, Sergeant Mackie.

MR. FLANNERY: I will offer this into evidence, Your Honor, Government's Exhibit 6, for identification.

MR. DODSON: I object.

THE COURT: The Court is prepared to rule. Do you wish to come to the bench?

MR. DODSON: No.

THE COURT: Note the objection is overruled. Proceed.

Government's Exhibit 6 is received in evidence.

MR. FLANNERY: Thank you.

(Whereupon Government's Exhibit No. 6 was received in evidence.)

BY MR. FLANNERY:

Q. After the Defendant signed Government's Exhibit No. 6, what was done next in this case, Officer Yuter? A. The complainant was then brought into the office with her mother and confronted with the
79 Defendant.

Q. All right. What occurred in the presence of the complainant and her mother? A. The complainant then again repeated her allegation; and at the conclusion, the Defendant denied that -- he didn't deny that he did have intercourse with her, but he again stated that she had offered him a little bit for a quarter.

Q. Did he say in her presence that he had had intercourse with her? A. Yes, sir.

Q. But denied that he had done it with force? A. That is right, sir. He denied any force.

He further stated that if he hadn't been drinking some the night before, he probably would never have done it.

Q. Now then, Detective Yuter, did you handle certain evidence in this case, a slip and a pair of panties? A. Yes, sir, I did.

Q. Will you describe to His Honor and the Jury what you did in connection with those? A. On the afternoon of November 23, Detective Hall, who was working four to twelve that particular week, came in and found out that Sergeant Mackie and I were handling the case; and he handed over to me an envelope containing a pair of child's panties and a child's slip; which I, in turn, received and sent to the Federal Bureau of Investigation for chemical analysis.

80 Q. Now, I will show you first this envelope, Government's Exhibit 3, for identification.

What is that? A. That is an envelope that was given me by Detective Hall.

Q. All right. Now then, I will show you the contents of this envelope, namely, first, Government's Exhibit No. 1, for identification.

Can you identify those? A. I put my initials on them, Mr. Flannery, when I took them. Yes, sir, my initials are here.

Q. Speak up real loud. A. My initials are on these, yes, sir.

Q. I will show you this slip, Government's Exhibit 2, for identification. Can you identify the slip? A. Yes, sir.

Q. By your initials on there? A. By my initials on there, that is correct.

Q. Now, what did you do with the envelope, the panties and the slip which are Government's Exhibits 1, 2 and 3, for identification?

A. I labeled them and took them to the Federal Bureau of Investigation and turned them over to Special Agent Semmes of the FBI laboratory.

CROSS EXAMINATION

BY MR. DODSON:

Q. Sergeant, why didn't you take this man, before you interrogated him, to the United States Commissioner or to the magistrate over in the Police Court? A. I am sorry, sir, I didn't hear your question.

Q. Why didn't you take this man to the United States Commissioner before you interrogated him? A. Why didn't I take him directly to the --

Q. U.S. Commissioner or before the Police Court before you interrogated him? A. Before I had an opportunity -- before I gave the man an opportunity to tell me whether or not he was guilty or innocent?

Q. Yes. A. That is not my procedure, sir.

Q. I see. Did you tell him he had a right to have a lawyer before he answered these questions? A. I don't recall telling him that, no.

82 Q. Did you know at that time he had steadfastly denied that he had done anything? A. There was a note to the effect that he denied it the night before, yes, sir.

Q. You knew that. And you knew that he had been arrested since that night, the previous night at eight o'clock; didn't you? A. I believe I was certain of the time.

Q. And how close is your office to the office of the United States Commissioner? A. It is across the street, sir.

Q. So there was nothing stopping you from carrying him there if you wanted to carry him before he was interrogated; was there? A. Why, no, sir.

Q. Now, when he gave you this statement, and you called in this lady to take it down, did she take it in shorthand? A. She wasn't called in. She is employed in the Sex Squad.

Q. All right. When she set about reducing it to writing, did she take it in shorthand? A. No, sir.

Q. Did she type it directly from his words on the typewriter? A. That is correct, sir.

83 Q. I notice that you have quotation marks on this statement here. Do these purport to be his exact words? A. They were the words the best of my recollection as he gave them to the policewoman.

Q. You ought to know whether -- was she taking the words as he

was speaking? Was she typing that way? A. Verbatim.

Q. And you would say, then, all these words in this statement here were his verbatim knowledge? A. I would say so.

Q. Was all this typed before he signed it? A. Yes, sir.

Q. And all of it was typed in here before he signed it? A. Oh, yes.

Q. Even the last line, which says:

"I can't read so Sergeant Mackie read this statement to me, and when he finished, I signed my name at the bottom."

Now, which went on, what you told us or what the statement says?

A. To the best of my recollection, the officer, Miss Plath, asked the Defendant -- well, she ascertained he couldn't read and write; and I am certain she put that down there before it was even read to him, yes, sir.

84 Q. So this doesn't state exactly what happened on this statement here:

"I can't read so Sergeant Mackie read this statement to me, and when he finished, I signed my name at the bottom."

A. I don't follow you, sir.

Q. So the statement that is in the last sentence in this alleged statement of this Defendant -- reading from Government's Exhibit No. 6, the very last sentence in the statement:

"I can't read so Sergeant Mackie read this statement to me and when he finished, I signed my name at the bottom."

A. I am pretty certain that that was put in there as he -- I am not sure now whether Sergeant Mackie read it to him and then that was put on that, or whether it was put on the bottom and then read to him.

But let me assure you, sir, it was definitely read to him before he signed it.

Q. Oh, yes, I believe that. Now, you say here he says, down here:

"Course, I probably wouldn't have if I hadn't been drinking and intoxicated."

Did he use that kind of language? A. He did.

85 Q. And with that good English:

"Course, I probably wouldn't have if I hadn't been drinking and intoxicated." A. That is right, sir.

Q. In your interrogation of this Defendant, did you find out how much schooling he had? A. I did not.

Q. Did you find out where he had had his schooling? A. No, sir; I didn't go into that particular background.

Q. You didn't know then at that time that he had only been in about four years around in a grade school in South Carolina; did you? A. I didn't have the slightest idea, sir.

Q. You say that type of language in his statement is his own words? A. Yes, sir; to the best of my knowledge it is.

* * * *

CHARLES A. MACKIE

86 * * * *

DIRECT EXAMINATION

BY MR. FLANNERY:

* * * *

Q. You are a member of the Metropolitan Police Force attached to the Sex Squad; are you not? A. Yes, sir.

* * * *

Q. And on that date, November 23, 1956, did you assist and participate in the investigation of this case? A. Yes, sir.

Q. Please tell His Honor and the Jury what you did? A. We talked to the Defendant. I say, "we." That was Detective Yuter and myself, about 9:00 a.m., November 23, 1956, in the Sex Squad office.

Q. All right. Now, did the Defendant say anything at that time in connection with this case? A. Yes, sir, he did.

Q. And before he did, were any promises made to him either by you or anyone else in your presence? A. No, sir.

87 Q. Did anyone threaten him? A. No, sir.

Q. Use any coercion or force on him of any kind? A. No, sir.

Q. What, if anything, did the Defendant say at that time in connection with this case? A. He stated he had relations with the child; that

he said he wouldn't have had relations with her unless he had been drinking.

Q. All right. Did he go into any detail as to just what had happened and what he had done? A. Yes, sir. He said that the child approached him and asked him if he would give her a quarter if he -- if she would give him a little bit.

Q. All right. A. And he said he agreed to it.

Q. Then what did he say he did? A. He said he took her to an apartment upstairs -- or, rather, the child met him in the hallway of the apartment building; and they went into a room; and he said he put some paper down and had relations with her.

Q. All right. Did he say anything else; or was that just about it?

A. No. He said that he gave her twenty cents, or more, for doing this.

88 Q. All right. Then what else did you do in connection with this case? A. We advised him of his rights and asked him if he wanted to reduce his statement to writing; and he agreed to do so.

Q. Will you tell His Honor and the Jury how the statement was taken? A. The statement was taken by Miss Plath, who is a policewoman attached to the Sex Squad; and Detective Yuter and myself witnessed it.

Q. And was it reduced to typewritten form? A. Yes, sir.

Q. And then what was done after the statement was typed up?

A. After the statement was typed, I read the statement to the Defendant, after which he signed it.

Q. All right.

Now, I show you Government's Exhibit No. 6, which has been introduced into evidence.

Is that the statement about which you just testified? A. Yes, sir.

Q. How do you identify it? A. My signature is on the bottom.

Q. Now then, after Defendant signed this statement, Government's Exhibit 6, then what happened next? A. The complainant was brought back.

89 Q. By the "complainant," you mean the little girl, Shirley A. Mallory? A. Yes, sir.

Q. All right. Go ahead. A. She was brought to the rear of the Sex Squad office; and she confronted the Defendant; repeated what was alleged.

Q. Was anyone else there at that time? A. The child's mother, and there was another lady there, I believe the grandmother, and Miss Plath, the policewoman, Detective Yuter, and myself.

Q. All right. What happened at that time when all those people were there? A. The complaining witness told what had happened the previous night, as she alleged; and at that time, the Defendant stated that the child had removed her own panties, and that he didn't take her by the hand into the room, but she went there herself; and he admitted giving her some money for doing this.

Q. Did he admit at that time that he had intercourse with her?

A. Yes, sir.

Q. When was this Defendant taken over to be arraigned; do you know? A. It was before noon. I am not sure of the exact time.

90 Q. You are not sure, but before noon? A. Yes, sir.

Q. Was that Municipal Court or before the Commissioner?

A. Municipal Court.

* * * *

CROSS EXAMINATION

BY MR. DODSON:

Q. Mr. Mackie, I would like to get from you just how this statement was taken.

As this Defendant talked, would the policewoman type on the typewriter? A. Yes, sir.

Q. And was the entire statement taken down while he was talking on the machine? Was it all taken down in one time? A. No, sir. He would make a statement, and Miss Plath would type down what he stated.

Q. But she never removed the paper out of the machine until the statement was over; did she? A. I don't recall that a paper ever being removed. I think the fact that he couldn't read and all was determined before the paper was removed.

Q. And was she paraphrasing what he said; or was she putting down directly the words that he said? A. As near as I can recall, she was putting down just as close as possible to what he was actually saying.

91 Q. And did you know anything about the background of this Defendant, as far as his schooling and education was concerned? A. I do know that he said that he couldn't read, but that he could write.

Q. And did you know where he had gotten what meager education he had gotten? Did you know where he had gotten that from? A. I may possibly have known at the time through the line-up sheet, but I am not positive of that.

Q. You are positive that he used such words as "intoxicated"? A. Yes, sir; as near as possible to put it down, that is the way she put it down.

Q. And he used such words as "intercourse"? A. Yes, sir.

Q. And he used such good English as, "I would have done so-and-so", or, "I would not have done so-and-so"?

He used that kind of English? You are positive of that, as used in this statement? A. The statement was taken down as near as possible as to the way he said it.

Q. Now, did you tell this man that he didn't have to make any statement to you? A. I did, yes, sir.

92 Q. You knew at the time that you started your interrogation that he had steadfastly denied any connection with this crime; did you not? You knew that? A. I knew that he had previously denied it, yes, sir.

Q. Why didn't you take him to the United States Commissioner or to the Police Court before you started questioning him? A. Well, that was about 9:00 a. m.; and the Police Court wouldn't have been open at that time.

Q. The United States Commissioner is always available, isn't he, more or less? A. Not always, no, sir.

Q. But can be gotten together very quickly, on short notice? A. Yes, sir, at times.

Q. And you didn't tell him before you had him sign this that he had a right to have a lawyer to determine whether he ought to sign it or make any statement; did you? A. I advised him of his rights, yes, sir.

Q. What rights did you advise him of? Did you advise him of a right to appear before the magistrate first before he made any statement?

A. No, sir.

MR. FLANNERY: I don't know that there is any such statute.

93 MR. DODSON: He said he advised him of his rights; and I am asking him what rights he was advising him of.

THE COURT: The witness may answer.

BY MR. DODSON:

Q. Did you advise him of his rights to appear before a magistrate before he made any statement to you? A. No, sir.

Q. Did you advise him of his right to have a lawyer before he made a statement to you?

MR. FLANNERY: There isn't any such right.

THE COURT: That is a legal question. The Court recognizes that. You may interrogate the witness as to what took place. That is conclusion.

MR. DODSON: He said he advised him of his rights. I want to know what rights he advised him of.

BY MR. DODSON:

Q. Tell me one by one the rights you advised him of. A. I asked him if he wanted to reduce his statement to writing. I told him he did not have to do so; that any statement he gave could be used for or against him in Court at the time of the trial.

He said that he would give a statement.

94 Q. Did you tell him that he had a right to demand to be taken at once before a committing magistrate? A. No, sir.

Q. I want to call your attention to this last sentence in Government's Exhibit No. 6, which reads as follows:

"I can't read, so Sergeant Mackie read this statement to me, and when he finished, I signed my name at the bottom."

Now, can you tell me how that got in the statement before he signed it? A. As I say, I didn't recall the statement being removed from the typewriter.

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JOHN J. MCPHAUL, JR.

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DIRECT EXAMINATION

BY MR. FLANNERY:

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Q. Where are you employed? A. I am an intern at D. C. General Hospital.

Q. Are you a medical doctor? A. Yes, sir.

Q. Graduate of a medical school? A. Yes, sir.

Q. What medical school did you graduate from? A. Georgetown University School of Medicine.

Q. When was that, Doctor? A. Last year, 1956.

Q. Since you graduated in '56, have you been assigned to the staff as an intern at the District of Columbia General Hospital? A. Yes, sir.

Q. Were you on the staff as an intern on November 22, 1956?

A. Yes, sir.

Q. And in connection with your duties on that date, November 22, 1956, did you have occasion to examine one Shirley A. Mallory? A. I did.

Q. What time did you first see her? A. I don't have the exact date here, but as I recall, it was late in the evening, approximately eight, nine or ten o'clock. I am not exactly certain.

96

Q. You say you don't have the date there? A. The date is here on the chart; the time is not.

Q. Oh. Does it reflect the date as being November 22? A. Yes, sir.

Q. All right. What is your recollection as to the time? A. In the evening.

Q. All right. Would you say after nine o'clock or ten o'clock?

A. I would say approximately nine o'clock. That is only an estimate, sir. I have no way of telling exactly.

Q. All right.

Now, the record that you have there, is that your own personal record that you made in your handwriting? A. No, sir. This is a notation made, "Medical-Legal Examination," entitled, given to me by the

policewoman that came with the patient, which I filled out and signed.

Q. You filled that out? A. Yes, sir.

Q. Now, can you testify without referring to that record or do you need that to help you? A. Whichever you prefer. I remember the case; and I remember the examination.

Q. Then suppose you proceed without the record, but if you need it, just tell us.

Please tell His Honor and the Jury what you did in connection with
97 Shirley A. Mallory, and what you found? A. I was told by the policewoman --

MR. DODSON: I object.

THE COURT: Yes. Don't make any statement as to any conversation between persons out of the presence and hearing of the Defendant.

BY MR. FLANNERY:

Q. Just what you did. A. The panties and slip were stained with a sort of brownish stain. The panties in the perineal area, that is, the area between the legs; the slip in the area comparable to that in the front and the back area of the slip.

Girl not excited, not alarmed. No external bruises.

Examination of the genital area, itself, revealed the hymen to be open and not bleeding. No lacerations, cuts or tears in that area at all.

There was a pearly fluid on the inside in the most dependent, lowest part of the vagina and also some dripping out of the vulva, itself.

The mucous membranes, that is, the lining of the vagina, itself, was reddened as though it had been irritated, but no cuts or lacerations.

Q. Then what did you do? Did you take a smear test? A. Yes, sir; a smear was taken and sent to the laboratory for examination. I examined the smear later myself.

98 Q. Please tell the jury how you take a so-called smear test.

A. One puts a speculum in the vagina. This is a two-leaf affair, which is on a pivot here. By opening this, spread the vagina such that one can examine it adequately inside; take a cotton-tip stick applicator, and rub it through the fluid, and take the fluid and smear it on a microscope slide.

This slide was initialed by myself; given over to the custody of the policewoman; from her sent to the laboratory examined microscopically, after a stain had been made.

Q. Did you have occasion yourself to examine that slide on which you put the substance? A. I did examine the slide.

Q. What did you discover on the slide? A. The slide showed typical sperm heads and tails on the stained specimen. The sperm are excreted from the male genital organ during the act of copulation or intercourse.

Q. What did that indicate to you? A. This indicated that sperm fluid was in this woman's vagina.

Q. Did it indicate to you recent intercourse, sexual intercourse?
A. Yes.

Q. It did.

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MR. FLANNERY: Your Honor, at this time I would like to introduce into evidence Government's Exhibits 1, 2 and 3, for identification.

100

THE COURT: Objection?

MR. DODSON: No objection.

THE COURT: Government's Exhibits 1, 2 and 3 are received in evidence.

(Whereupon Government's Exhibits 1, 2 and 3 were received in evidence.)

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ALLISON C. SEMMES

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DIRECT EXAMINATION

BY MR. FLANNERY:

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Q. Where are you employed? A. At the Federal Bureau of Investigation.

Q. In what capacity? A. I am a Special Agent assigned to the Serology Unit of the laboratory; and I am concerned with the examination and identification of body fluid stains.

Q. All right. Did there come a time when Officer Yuter turned over to you certain property in connection with this case? A. Yes.

101 Q. When was that? A. December 5, 1956.

Q. I show you what has been introduced into evidence as Government's Exhibit No. 1, for identification, a pair of panties.

Can you identify that, Agent Semmes? A. Yes, I can. I placed my initials on them in the FBI laboratory.

Q. All right.

Now I will show you what has been introduced into evidence as Government's Exhibit No. 2.

Can you identify that? A. Yes, I can. I also placed my initials on this garment in the FBI laboratory.

Q. All right.

Now, with respect to those two garments, 1 and 2, you conducted tests on them; did you not? A. Yes, I did.

Q. Before I ask you what you did, will you give the Jury somewhat of your background, training and experience, Agent Semmes?

A. Yes. I have a Bachelor of Science degree in chemistry from the University of Alabama; and after I graduated, I was employed for about a year as an analytical chemist with the Tennessee Valley Authority.

102 I then entered the FBI. Approximately three years ago, I was transferred into the laboratory; and in the laboratory, in the serology unit, I trained under the other agents who were assigned there and learned more about this particular field of work. And I have in the past conducted thousands and thousands of examinations of evidence of this type.

Q. When did you graduate from college? A. 1950.

Q. And you have been with the Federal Bureau of Investigation how long? A. Approximately five years.

Q. And you have been with the laboratory three years; did you say? A. About three years.

Q. During that time, you have examined thousands of pieces of evidence? A. Yes.

Q. What type of examinations do you conduct on evidence? A. I conduct examinations of body fluid stains; and two of them would be semen, which is the male reproductive fluid, and blood, of course, which you know what it is.

Q. All right.

Now then, with respect to those two items before you, the pair of panties and slip, Government's Exhibits 1 and 2, will you please tell His
103 Honor and the Jury what tests you conducted on those two items and what the results of the tests were? A. I examined the panties for the presence of seminal stains. Semen, as I said before, is the male reproductive fluid, and it contains the male reproductive cells, which are spermatozoa.

In the crotch area of the panties, I saw what appeared to be stains. I cut these stains out and soaked them in saline solution; and then searched the saline solution with a microscope; and in this solution, which was an extract of the stain, I identified spermatozoa, or the male reproductive cells, which conclusively proved that these stains in the crotch of the panties were seminal stains.

I conducted a similar examination on this large yellowish stain which was present on the rear of the slip; and I again identified this stain as being a seminal stain.

I also examined the two items for the presence of blood; but I did not find any.

* * * *

105 MR. FLANNERY: Your Honor, at this time, I wish to offer into evidence the cigarette lighter, No. 5, for identification.

THE COURT: Government's Exhibit 5 will be received in evidence.

(Whereupon Government's Exhibit No. 5 was received in evidence.)

MR. FLANNERY: Your Honor, may I read Government's Exhibit 6 to the Jury at this time?

THE COURT: You may.

106 MR. FLANNERY: Ladies and gentlemen of the Jury, I will now read to you the statement of the Defendant, the written statement, which

has been introduced into evidence, Government's Exhibit 6.

It starts off:

"Office of the Sex Squad

"Metropolitan Police Department

"Washington, D. C.

"November 23, 1956

"Time: 9:13 A. M.

"TO: Milton Leo Mallory, colored, 33 years, of
1223 12th Street, N. W., janitor's quarters.

"From: Det. Sgt. Charles A. Mackie and Pct. Det.
Sylvan Yuter, who have identified themselves to the defen-
dant as officers of the Metropolitan Police Department,
Washington, D. C.

"Milton Leo Mallory, you are being held on the
complaint that about 7:15 P. M. on November 22, 1956,
in Apartment No. 3 at 1223 12th Street, N. W., you did
force one Shirley Ann Mallory, colored, 8 years, of
1722 15th Street, N. W., basement, to have sexual re-
lations with you.

107 "You are now requested to give a statement of any
facts known to you in connection with this matter. How-
ever, you are first advised that you are not compelled to
make a statement, are not promised any favor or considera-
tion for making one and do so of your own free will. If
necessary, the statement you make will be used for or
against you in Court at your trial. Having been so advised,
do you wish to give a statement?

"Reply: by Milton Mallory, 'yes.'

"Statement:

"On the 22nd of November about 6:00 P. M. my wife
was taking a bath and the other girl, Shirley, she came in
and she told me if I give her a quarter she will give me a
little bit. I told her meet me upstairs in the hall. She went
out the front door and I went out the back door and met her

upstairs. I went in apartment 3 upstairs, a vacant apartment, and spread paper on the floor. That's where I had the intercourse with her. She took her panties off. After we finished, she went on out ahead of me and she went across the street where her mother was then and I went on up the street.

"When I came back, the officers were there then.

108

"She asked me to have intercourse with her. Course, I probably wouldn't have if I hadn't been drinking and intoxicated. I didn't force her. Last night was the first time I ever had any relations with that girl.

"I guess that's about it. I can't think of nothing else.

"I can't read so Sgt. Mackie read this statement to me and when he finished, I signed my name at the bottom." Then this statement is signed, "Milton Leo Mallory.

"Witnesses: Charles A. Mackie

Joyce Plath

Sylvan Yuter

"Finished: 9:32 A. M. --11-23-56."

The Government will rest its case.

* * * *

ELIZABETH HAGLER

was called as a witness by and on behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

109

DIRECT EXAMINATION

BY MR. DODSON:

Q. Mrs. Hagler, I want you to speak up clearly and distinctly, so His Honor and the farthest lady over there in the box can hear you.

Now, will you state your name, please? A. Elizabeth Hagler.

Q. And where do you live, Mrs. Hagler? A. 1200 Monroe Street,

N. W.

THE COURT: How do you spell that name?

THE WITNESS: My name?

THE COURT: Last name.

THE WITNESS: H-a-g-l-e-r.

THE COURT: Very well. Proceed.

BY MR. DODSON:

Q. Mrs. Hagler, what is your occupation? A. Housewife.

Q. And are you the wife of a minister? A. Yes, I am.

Q. Do you know Mr. Milton Leo Mallory, who sits here, the Defendant? A. Yes.

Q. Do you know his father? A. Yes, I do.

110 Q. And how long have you known the Mallory family? A. Oh, about ever since about '52 or -- '52, I think.

Q. Since 1952? A. Yes.

Q. And have you had occasion during the time that you have known them to visit with them at their home on 12th Street? A. Yes, I have.

Q. Can you give us that address on 12th Street? A. 1223.

Q. And what part of the premises does Mr. Mallory occupy?
A. The janitor's quarters.

Q. And that is located where? A. Downstairs.

Q. In the basement? A. Yes.

Q. Directing your attention specifically to the 22nd of November of last year, did you have occasion to be at the premises at 1223 12th Street? A. Yes, I did.

Q. And what time of the day were you there? A. I was there between five-thirty and seven.

Q. And will you tell us what your mission was there that day?
A. Well, I was moving some things to my residence.

111 Q. Some surplus material? A. Yes.

Q. And did you have occasion to go down to the basement apartment? A. That is where I had to go for them.

Q. I see. Will you tell us, then, did you see on that occasion, little Shirley Mallory? A. Yes, I did.

Q. What time of the day was that that you saw her? A. That was between -- we had gone after our last load of things -- that was between six-thirty and seven.

Q. And what part of the premises did you see little Shirley in?

A. Well, she was down the stairs.

Q. In the basement? A. Yes.

Q. Who else was there with her? A. There were two boys that were down there, and a little girl sitting on the steps; and there was some more children in the hall, girls and boys.

Q. How large were these boys who were down there with her?

A. I would say they were about the age of -- well, eleven and thirteen, somewhere along there.

112 Q. Were they kind of robust lads? A. One of them was a little short, but the other one was kind of tall.

Q. Did you actually go down into the basement? A. Yes, I was in the basement.

Q. And what were they doing when you went down there? A. Well, they -- I didn't see them doing anything, but the little boy picked up something that belonged to me that was in the pile of things that we had to move; and I said: Put it down. That belongs to me.

I said: Get out of here.

The other little boy said: Let's go, man.

So they went up the steps.

And the little girl sitting on the steps said something there belonged to her that was down in this pile. The things I was supposed to move were piled at one side.

Q. At that time, did you see this young man around the place at all? A. No, he wasn't at home.

Q. Did you see his father? A. No, neither of them wasn't there.

Q. Did the boys then leave the young girl? A. Yes.

113 Q. Were there any other girls down there with these two boys and Shirley? A. There was a little girl sitting on the steps, sitting about the second step from the top coming down. And the other children were up at the hall.

Q. How long did your tasks keep you there at the premises?

A. I just can't recall. I tell you -- I can tell you what I moved. I moved

a stove and two beds and a mattress and some screens.

Q. Approximately how long would you say you stayed there this time? A. I guess about seven.

Q. Until about seven. And was Shirley down within your sight most of that time? A. No; I didn't see her after she left out; I didn't see her any more.

Q. Did she go up when the boys went up? A. She went up the steps where the little girl was, and they went out.

Q. Which door did the boys go out? A. They went up the steps.

Q. Did she go up the same steps the boys went? A. Yes.

Q. That was the last you saw of her or the boys? A. Yes.

Q. Now, how long have you known Leo here? A. Well, I have known him, I suppose, ever since I have known the family.

114 Q. Now, do you know other people in the community where he lives that know him? A. No. I had no occasion of meeting any of the people in the neighborhood.

Q. Do you know people in the church that know him? A. Yes.

Q. Do you know what his reputation is among those people for peace and good order? A. Well, very good, as far as I know.

Q. Have you ever visited in their home? A. Yes.

Q. And have your children ever visited in their home? A. Yes.

Q. Do you have girl children? A. Yes; I have one fifteen and sixteen.

Q. Have they visited in the home where this young man was? A. Well, when I send down after something. It doesn't matter who I send, just since one of the children goes for it.

Q. You have never seen him do anything that would cause you to be suspicious of his conduct? A. No, I have not.

115 MR. DODSON: I think you may inquire.

CROSS EXAMINATION

BY MR. FLANNERY:

Q. Do you know exactly what time you were there that evening?

A. Well, as I said, at first, it was between five-thirty and seven, because we made three trips. I just have a car and I was moving the things in the

car.

Q. Sometime between five-thirty and seven? A. That is right.

MR. FLANNERY: That is all.

REDIRECT EXAMINATION

BY MR. DODSON:

Q. You did fix the time that you saw Shirley? A. Shirley. It was between six-thirty and seven. That was my last load that we had to get.

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124

MILTON LEO MALLORY

* * * *

DIRECT EXAMINATION

BY MR. DODSON:

* * * *

Q. Will you state your full name? A. Milton L. Mallory.

Q. Now, you are not keeping your voice up. A. Milton Leo Mallory.

Q. How old are you, Mr. Mallory? A. Thirty-three.

Q. And where were you born? A. In Allison County, South Carolina.

125 Q. And where were you reared? Where were you raised? Where were you brought up? A. In Reevesville, South Carolina.

Q. Did you live in the country or in the dity down there? A. Yes, sir.

Q. Where did you live? A. I live in the country.

Q. And how much schooling did you get in South Carolina? A. Fifth grade.

Q. To the fifth grade? A. Yes.

Q. How many months a year did you go? A. I went about three years; I go a half a day at a time.

Q. Half day at a time. About how many a year? A. I would say about three months in all.

Q. So when you left South Carolina, you had finished the fifth grade in South Carolina? A. Yes, sir.

Q. Now, as a result of that schooling, can you read and write?
A. I can't read and write anything but my name.

- 126 Q. When did you come to Washington? A. In '48.
- Q. And did your father come at the same time? A. No, sir.
- Q. When did he come? A. He came about five months later.
- Q. Since you have been to Washington, have you worked? A. Yes, sir.
- Q. Where have you worked? A. When I first came to Washington, I was working for Miller Loan Construction Company for about five months. Then I started work for S. Kay Construction Company. Same job I am on now.
- Q. How long have you worked for them? A. I worked there since '49.
- Q. At the time that this trouble occurred, were you still working for them? A. Yes, sir.
- Q. What kind of work were you doing with them? A. Construction work.
- Q. In wintertime, that work is slow, is it not? A. That is right.
- Q. About how many days a week were you working at this time?
- A. At that time, I was working two and three days a week.
- 127 Q. Now, Mr. Mallory, I am going to ask you how long have you known little Shirley Mallory, who testified here? A. I been knowing her practically all her life.
- Q. And did you know her in South Carolina? A. Yes, sir.
- Q. Did there come a time that she came to Washington to live?
- A. Yes, sir.
- Q. And where did she come? A. She came to live with us.
- Q. When you say, "with us," who is "us"? A. My father.
- Q. And your mother? A. That is right.
- Q. And how many bedrooms did they have? Was that at 1223 12th Street? A. That is right.
- Q. How many bedrooms did they have there? A. We only had one bedroom.
- Q. How many people were living down there at the time that Mrs. Littlejohn and her daughter came to live there? A. At the time she came,

my mother and my father and my brother and myself and my girl friend.

Q. And your girl friend? A. Yes.

128 Q. Is that Shirley Mae Curtis? A. That is right.

Q. In addition to that then came Mrs. Littlejohn and little Shirley?

A. That is right.

Q. How long did she live there at 1223 with your mother and father under those circumstances? A. I would say about three months, three or four months.

Q. During that time, did you have occasion to notice her, see her at all times practically? A. Yes, sir.

Q. And did you see her during those times in all states of dress and undress? A. Yes, sir.

Q. At any time, did you ever molest or attempt to molest that child? A. No, sir.

Q. Now, directing your attention to the 22nd day of November, what day was that? What special day was that? A. That was on Thanksgiving.

Q. And what time did you get stirring that day? A. I got up around eight o'clock that morning.

129 Q. And had Shirley Mae Curtis spent the night there before that with you? A. Yes.

Q. In fact, she was living there at the time; was she not? A. Yes, sir.

Q. And after you got up, what did you do? A. Well, after I got up, I clean up around the house there, the halls, swept and mopped them down and everything.

Q. And did that take all the morning? A. Well, not all the morning. Practically all the morning.

Q. What were your movements in the afternoon? A. Well, in the afternoon, I got up -- somebody came up to look at the apartment. I went up and showed them the apartment. I went back downstairs and sat around there a while; and then I went up and got me a drink and I start drinking.

Q. Prior to the time that you got a drink, did you have any relations with Shirley Mae Curtis? A. Yes, sir, during the afternoon.

Q. What time was that? A. I would say around four o'clock, four-thirty, something like that.

Q. Up to that time, had you seen little Shirley Mallory that day?
130 A. No, sir.

Q. Did there come a time that you finally saw Shirley, little Shirley? A. I saw her later on that afternoon.

Q. About what time was it? A. I would say around six o'clock, I imagine, something like that.

Q. And where did you see her? A. She came down the apartment to see Shirley, the other Shirley.

Q. What was Shirley doing at that time? A. At that time, she -- when she came down, she was putting on dinner.

Q. Did she see Shirley? A. Yes, sir.

Q. At that time, was Shirley taking the bath, big Shirley taking the bath? A. Then she went in to take a bath.

Q. Took a bath after that? A. Yes, sir.

Q. What happened to little Shirley at that time? A. She went back out.

Q. Did you have anything to say to Shirley at that time? A. No, I didn't.

131 Q. Did Shirley have anything to say to you? A. No.

Q. Now, what happened after that? A. After that, I went out and filled the furnace up with coal; and then I went on upstairs and started drinking, got me another drink.

Q. You went up to get another drink? A. Yes, sir.

Q. Why did you go upstairs to get a drink? A. Well, I always kept my drinks up there. My father didn't allow me to drink in the house. I would leave it up there and when I wanted a drink, I would go up and get a drink.

Q. When you say, "up there," where did you leave it up there?
A. In the vacant apartment 3.

Q. Was anybody living in that apartment? A. No, sir.

Q. And when you went to that apartment to get this drink -- by the way, what were you drinking? A. I was drinking wine.

Q. And did you see Shirley, little Shirley? A. Yes, sir, I saw her.

Q. And where was she at that time? A. She was in the hall.

132 Q. Was anybody with her? A. Was her and some boys up there.

I think -- I think two boys and some little girls. I don't know. I didn't pay much attention to them.

Q. What were they doing? A. Running back and forth through the hall, playing.

Q. How big were these boys about? A. I would say between thirteen, fourteen.

Q. At that time, did you have anything to say to either Shirley or any of the children that she was playing with? A. No, sir.

Q. Was the apartment door locked into which you were going?
A. No, sir; it wasn't locked then.

Q. It was not locked? A. No.

Q. When you went in, did you close the door behind you? A. Sure, I pulled it to, yes, sir.

Q. Did you lock it behind you? A. No, sir.

Q. After you got in there, what did you do? A. I pulled my coat off and sit down on it and start drinking.

Q. How much wine would you say that you drank while you were
133 sitting there? A. Well, at that time, I guess I was finishing up out of a fifth bottle at that time.

Q. Would you say you were almost drunk at that time? A. Yes, sir; I was pretty high.

Q. Pretty high? A. Yes, sir.

Q. And at any time while you were in there, did Shirley come in there, as far as you know? A. If she did, I didn't see her.

Q. And what happened to you in there? A. I was sitting there drinking. I fell asleep.

Q. And did there come a time after that that you awakened?
A. Yes, sir.

Q. Did you see Shirley at that time? A. No, sir.

Q. Did you see any evidences that she had been there? A. No, sir.

Q. And what did you do then? A. I got up and I went up to a friend of mine house and he wasn't home. So I walked around the block. I came back and I stopped out front beside the fence.

Q. And is that where you were standing when the officers saw you?

134 A. Yes, sir.

Q. And took you back to the apartment? A. Yes, sir.

Q. What was your condition then, as to whether you were drunk or sober? A. I didn't understand you.

Q. Well, were you -- you said a minute ago that you were pretty high. Were you still high? A. Oh, yes, sir.

Q. You have heard Officer Hall testify -- that was the first officer, the officer that took you into the apartment building, when they told you what they were asking you about, you denied it at that time; did you not?

A. Yes, sir.

Q. Did you continue to deny it as far as that officer was concerned?

A. Yes, sir.

Q. Now, on the next morning, what happened? Did the questioning start all over again with you? A. Yes, sir.

Q. You saw what has been introduced as Government's Exhibit No. 6, which was this alleged confession. Did you sign that paper?

A. Yes, sir, I signed it.

135 Q. Will you tell the Court and this Jury why you signed it? A. I signed it because they asked me to sign it.

Q. And were you any more guilty at that time than you were when you told Officer Hall that you were not guilty? A. No, sir.

Q. Now, what did he say to you that made you feel that you had to sign that paper? A. Well, he told me that morning to start with, he told me -- said that they had carried the girl over and had a check; and told me -- and said that I know I did it, and might as well go ahead and tell them I did it.

Q. What else did they say? Did they make any promises to you at that time? A. Told me if I signed it, he would go easy on me, if I

said I did it.

MR. DODSON: Could I have that exhibit?

BY MR. DODSON:

Q. In this Government exhibit, I am reading from a statement which they say you made:

"Course, I probably wouldn't have if I hadn't been drinking and intoxicated."

Do you use that kind of talk when you are talking? A. No, sir.

Q. And when this statement was handed to you, were you able to read it? A. No, sir.

136 Q. I hand it to you now and ask you if you can read it?

MR. DODSON: Let the record show that the witness is being tendered Government's Exhibit No. 6, which is the alleged confession.

THE COURT: It may so show.

BY MR. DODSON:

Q. Will you try to read that? Can you read that? A. No, sir, I can't. Nothing but the name.

Q. You know that is your name? A. Yes, sr.

Q. That is about the only thing you can do is to write your name?
A. Yes, sir.

Q. Now, Mr. Mallory, I ask you whether you have ever been in any trouble, either in South Carolina or in the District of Columbia?

A. I been drunk; locked up for drunk.

Q. Locked up for drunk in the District of Columbia? A. Yes, sir.

Q. But you have never been charged with any serious crimes in the District of Columbia? A. No, sir.

Q. Did you have a job ready to go on as soon as the S and K Construction Company opened up this year? A. He started up another job
137 right after Christmas.

Q. And you have been steadily employed by them ever since you left the first six-month job? A. Yes, sir.

MR. DODSON: I think you may inquire.

CROSS EXAMINATION

BY MR. FLANNERY:

Q. You say you were born and raised in South Carolina; is that right? A. Yes, sir.

Q. Came to the District of Columbia in 1948? A. Yes, sir.

Q. You have testified that you went to the fifth grade. A. That is right.

Q. Now, let me ask you this: You used to go to church; didn't you? A. Yes, sir.

Q. You know what is right and you know what is wrong even though you just went to the fifth grade; isn't that right? A. That is right.

Q. You know it is wrong to molest a little girl and have sexual intercourse with her; don't you? A. Yes, sir.

138 Q. You know whether you just went to the fifth grade or not; don't you? A. Sure.

Q. You know what the law is; and you know you have to obey the laws; don't you? A. Yes, sir.

Q. No question about that in your mind; is there? A. That is right.

Q. All right.

Now, I believe you also told your lawyer that you lived at 1223 12th Street; is that it? A. Yes, sir.

Q. And you lived there with some woman to whom you were not married; isn't that right? A. That is right.

Q. And a number of your other relatives lived in that room, too?
A. We all didn't sleep in the same room, see.

Q. What was that? A. We has three rooms there.

Q. You had three rooms? A. Only one bedroom, but we sleep in the other rooms.

Q. I see. When little Shirley Mallory and her mother came up from South Carolina, they didn't sleep in the room with you; did they?

139 A. That is right.

Q. Did they or didn't they? A. Yes, sir.

Q. They did? A. Yes, sir.

Q. Her mother, too? A. Yes, sir.

Q. And you and the woman that you were living with? A. She didn't sleep in that room; she slept in the room with my mother and father.

Q. The woman you were living with slept with your mother and father? A. Not in the bed. In the same room. Three beds in there.

Q. November 22 was Thanksgiving; wasn't it? A. Yes.

Q. I believe you told your lawyer you got up around eight o'clock; is that right? A. That is right.

Q. And Shirley Mae Curtis was there that day; wasn't she?

A. Yes, sir.

Q. Were your mother and father around the house that day?

A. No, they wasn't.

140 Q. Just you and Shirley Mae Curtis? A. That is right, and my other brother, he was there in and out part time.

Q. What is your other brother's name? A. James.

Q. James Mallory? A. Yes, sir.

Q. All right.

Now, you testified that there came a time in the afternoon when you went to Apartment No. 3 in that building is that correct? A. That is right.

Q. Now, what time did you go there? A. I don't know -- some people came to look at it, I guess around about one o'clock. I went up and showed it to them then.

Q. Where was your father this day? A. I don't know where he was. He wasn't home. I don't know where he was at.

Q. When was the last time you had seen him? A. That morning.

Q. Did he leave and go somewhere? A. Yes, sir.

Q. Did you know where he went? A. No, I don't know where he went.

141 Q. All right.

Now, you testified that you went to Apartment No. 3, which was on the first floor. A. That is right.

Q. For the purpose of getting a drink; is that right? A. That is right.

Q. And you testified, I believe, that you went to No. 3, a vacant apartment, to get a drink for what reason? A. I kept my drink up there. When I go get it, I leave it up there. I go back and forth and get a drink

when I want it, because my dad didn't allow me to drink in the apartment house.

Q. Of course, he wasn't there that day; was he? A. No, he wasn't.

Q. You could have done your drinking in your own apartment without any interference from your father? A. I never drink down there, whether he there or not.

Q. He wasn't there that day; was he? A. No, he wasn't there.

Q. What time did Little Shirley get to your apartment on that day?

A. I would say around six o'clock.

Q. In the evening? A. Yes, sir.

Q. And what time had you first gone to Apartment No. 3? A. Early
142 in the day. The first time I went up there around one o'clock to show the people the apartment.

Q. When was your next time to go up there? A. I had been up there off and on ever since then. Every time I wanted a drink, I would go up and get a drink.

Q. How many times did you go up there? A. I would say about three times.

Q. Now, when little Shirley came to your apartment, did you have a conversation with her? A. No, I didn't.

Q. How long did she stay there? A. She was only there about five minutes, I guess.

Q. And did she have a conversation with Shirley, the woman you were living with? A. They probably did. She was in the room where she was talking to her before she went to take a bath.

Q. Then after she was there five minutes, she left your apartment; is that correct? A. That is right.

Q. And then very shortly after that you left; didn't you? A. Yes; I went out to fill the furnace up.

Q. You did what? A. Went out to fill the furnace up with coal.

Q. I didn't understand that. A. I went out to fill the furnace up
143 with coal.

Q. Oh, to fill the furnace with coal. The furnace is in the basement; isn't it? A. That is right.

Q. But you went up to the first floor? A. I went out the back way and filled the furnace up; and then I went up to Apartment 3 to get me another drink.

Q. And how long was that after Shirley had left your apartment?
A. I would say about five minutes, five, ten minutes.

Q. And did you go up the back way, you say? A. That is right, after I filled the furnace up.

Q. And you had the keys to Apartment No. 3; didn't you? A. I been having them practically all day.

Q. Yes. And they are these keys, aren't they, Government's Exhibit No. 4, for identification? These are the keys you had; isn't that right? A. That is right.

Q. They are the keys to Apartment 3? A. Yes.

Q. Do you smoke? A. Sure.

Q. Were you smoking that day? A. Yes, sir.

Q. And you had your cigarette lighter with you; didn't you? A.
144 Probably did, yes, sir.

Q. And this is the cigarette lighter; isn't it, Government's Exhibit 5? A. That is right.

Q. That is yours? A. That is right.

Q. You know that that cigarette lighter was found in the apartment; don't you? A. That is right.

Q. Well then, I believe you told your lawyer that you went up to Apartment 3 about five minutes after Shirley had left and saw Shirley in the hall; didn't you? A. That is correct.

Q. And did you say anything to her? A. No, I didn't.

Q. Did she say anything to you? A. No.

Q. Did she proposition you? A. She didn't say anything to me; and I didn't say anything to her.

Q. You told the police, though, that she said something to you?
A. I know I did. They told me I might as well say that I did it; so I had to tell them something.

145 Q. You not only told the police that, you also said that in the

presence of the little girl's mother; didn't you? A. Yes, sir; but they done told me what to say, though. They done told me what to say. I even done made the statement when the little girl and her mother got there.

Q. They told you what to say? A. Yes, sir.

Q. You knew that what you were saying was a confession of something that was wrong; didn't you? A. I didn't know at the time, no, sir. He told me, go ahead and say I did it; go easy on me. I didn't know.

Q. You didn't know what at the time? You didn't know it was wrong to say you had molested and had intercourse with a little nine-year-old girl? A. I wasn't thinking at the time. Told me would go easy on me; so I would just --

Q. You know better than that, Mr. Mallory; don't you? Didn't you testify a little while ago you know the difference between right and wrong? A. Sure, I know it would have been wrong. I didn't have anything in mind doing anything like that.

Q. You know it is wrong to have sexual intercourse with a little girl; don't you? A. That is right.

Q. And yet are you telling this Jury that you admitted that you had
146 had sexual intercourse with the little girl in the presence of the mother and the little girl just because the police told you to say that? A. That is right.

Q. Well, you say that you saw Shirley in the hall, but you didn't say anything to her? A. No.

Q. And then you went into Apartment No. 3; is that right? A. That is right.

Q. And what did you do in there? A. I went in there and start drinking.

Q. What were you drinking? A. Drinking wine.

Q. And you went there a little after six o'clock, you say? A. That is right.

Q. How long after six o'clock was it? Was it six-thirty? A. I don't know exactly what time it was.

Q. Then did you tell your lawyer you fell asleep there? A. That is right.

Q. When you woke up, where did you go? A. When I woke up, I went up to a friend of mine house, but he wasn't home; so I walked on around the block; and I came back.

147 Q. What is the friend's name? A. Sir?

Q. What is your friend's name? A. They call him Shorty.

Q. Shorty? A. Yes, sir.

Q. Where did he live? A. He live -- the church on the corner; he live the second door from the church on the corner of 12th and M.

Q. Is that the church where you went to church? A. No, sir.

Q. What church did you go to? A. I didn't have no special church. When I wanted to go to church, I had to go to any church.

Q. I see. Well, the police arrested you near your house at 1223 12th Street; didn't they? A. Yes, sir.

Q. And that was a little before eight o'clock; wasn't it? A. Yes, sir.

Q. You remember that; don't you? A. Sure, I remember them arresting me.

Q. And you remember being questioned about this case? A. Yes, sir.

148 Q. You don't have any loss of memory about this; do you? A. About the case?

Q. Yes. A. I remember -- yes, I remember them arresting me that night.

Q. And you remember being questioned by the police; and you said at that time you hadn't bothered this little girl; didn't you? A. That is right.

Q. Your memory is very good on that. A. (Witness nods assent.)

Q. The police took you down to Police Headquarters and asked you a lot of questions about what your name was and the names of all your brothers and sisters, and you gave them all that information; didn't you? A. They didn't ask me all that that night.

Q. What? A. They didn't ask me that that night.

Q. They asked you where you came from, what your education was; didn't they? A. No, sir, they did not.

Q. They asked you questions about this case and you remember that? A. Yes, sir.

149 Q. So then the next morning, the little girl and her mother and her grandmother were there; isn't that right? A. That is right.

Q. Remember the old lady, Lucy Mallory, the grandmother of the little girl; she was there? A. Yes.

Q. And the little girl and her mother and these policemen; isn't that right? A. That is right.

Q. Before you saw them, you talked to Detective Yuter --

MR. FLANNERY: Please stand.

BY MR. FLANNERY:

Q. -- and Detective Mackie; didn't you? A. Yes, sir.

Q. And you told them that you had had sexual intercourse with this little girl; didn't you? A. They told me to say.

Q. Now just what did they tell you? You say they told you to say. Let's hear it. A. Just like I told you a while ago. They told me just like this. They said: You know they done carried the girl to the hospital; she done been checked. You had something to do with her. You might as well come on say you did so it will go easy on you.

Q. What did you say to that? A. After they said that, I told them
150 I did.

Q. And all they told you was the little girl has been taken over to the hospital, she had been checked, it has been proved that somebody molested her? A. (Witness nods assent.)

Q. Therefore, you had better tell us that you did it. Is that what they told you? A. That is right.

Q. If you hadn't done anything, why didn't you say, I am not going to admit I did anything. I told you all along I didn't do it; and I am going to repeat it. A. I went ahead and told them that I didn't want to be sudden frightened.

Q. You didn't what? A. I didn't want to be frightened, so I went ahead and told them that.

Q. You told them that, Mallory, because you know in your own heart that you had intercourse with that girl. A. I don't know anything about having anything to do with the girl.

Q. What? A. I don't know anything about having anything to do with the girl.

Q. But you told the police you did? A. That is right.

151 Q. Then remember the policelady being at the typewriter?

A. Sure.

Q. And they asked you to repeat it, and as you talked, she took it down on the typewriter? Do you remember that? A. That is right.

Q. Didn't the police say this to you: I want you to listen to this. Didn't they say to you:

"Milton Leo Mallory, you are being held on the complaint that about 7:15 pm., on November 22, 1956, in Apartment No. 3, at 1223 12th Street, N. W., you did force one Shirley Ann Mallory, colored, eight years, of 1722 15th Street, N. W., basement, to have sexual relations with you."

Didn't they say that to you? A. I don't remember them saying that to me.

Q. Did they say this: Mallory, you are being held for molesting that little girl. Isn't that just about what they said? Told you that; didn't they? A. Told me something like that.

Q. Then didn't they tell you that they wanted you to give a statement of any facts that you might know about this case? Didn't they ask you that? A. They asked me if I mind giving a statement, sure.

152 Q. They did ask you that. Then didn't they say they wanted to advise you that you didn't have to make a statement unless you wanted to? A. Yes, they did.

Q. They told you that; didn't they? A. Yes, sir.

Q. They told you that they weren't promising you any favor; didn't they? A. They didn't tell me that.

Q. What? A. They didn't tell me that.

Q. Didn't they tell you you could make the statement of your own free will? A. I don't remember them telling me.

Q. You don't remember that. Didn't they say that the statement would be used either against you or to help you, depending on what

the statement was? A. They told me that.

Q. And now you are telling this Jury that you made the statement because they told you to? A. That is right.

Q. Well, after you made your statement, and the lady typed it up, Officer Mackie read it back to you; didn't he? A. Sure, he read it.

Q. He read it back. Didn't he read this back to you:

153 "On the 22nd of November, about 6:00 p.m., my wife was taking a bath and the other girl, Shirley, she came in and she told me if I give her a quarter she will give me a little bit."

Didn't they read that back to you? A. I don't remember reading that.

Q. You don't remember that?

"I told her meet me upstairs in the hall."

Didn't they read that back to you? A. No, sir.

Q. You don't remember them reading that back to you? A. No, sir.

Q. "She went out the front door and I went out the back door and met her upstairs."

Do you remember them reading that back to you? A. No, sir.

Q. What did they read back to you? A. I don't remember reading anything back to me except the statement that the lady typed down that I signed.

Q. Didn't they read something back to you which meant this: That you admitted having intercourse with the girl. Didn't they read that back to you? A. No, sir.

154 Q. What did they read back to you in the statement? A. The only thing I remember reading back is the statement that I signed.

Q. And what was in the statement that they read back to you?
A. I don't know. I don't remember what was in the statement, but they read it.

Q. They read back to you what you had told them; didn't they?
A. That is right.

Q. And you had told them that you had intercourse with the little girl? A. That is right.

Q. And that is what they read back? A. Yes, sir.

Q. All right.

And then after it was read back to you, they asked you to sign it; didn't they? A. Yes, sir.

Q. I show you Government's Exhibit No. 6. That is where you signed it; isn't it? A. That is right.

Q. Then after you signed that statement, Government's Exhibit No. 6, they asked you to step out into the room where the little girl was; 155 isn't that right? A. In the room? No.

Q. Or did they bring the little girl into that room with you?

A. They brought her in there.

Q. They brought her mother in? A. That is right.

Q. And they brought her grandmother in? A. Sure.

Q. And the little girl repeated in the presence of all those people what you had done to her; didn't she? A. That is right.

Q. And you said, that is right? A. I didn't say that was right. I didn't say anything.

Q. You said: No, I didn't force her. She asked me to do it. Didn't you? A. I didn't say that.

Q. What did you say? A. They didn't ask me anything like that.

Q. What did you say when the little girl and the mother were there? A. I didn't say anything when she was making the statement.

Q. Didn't you say a little while ago that when the mother and the little girl were there, that you had admitted that you had intercourse 156 with the girl? A. Sure, I said that.

Q. You said that when the little girl was there and her mother was there and her grandmother was there; didn't you? A. Yes.

MR. FLANNERY: That is all.

REDIRECT EXAMINATION

BY MR. DODSON:

Q. Mr. Mallory, all of your bringing up down South, when white people tell you to do something, you will do it; won't you? A. Yes, sir.

MR. DODSON: That is all.

RE CROSS EXAMINATION

BY MR. FLANNERY:

Q. Mr. Mallory, whether it is a white person or colored person, if anybody tells you to do something that is wrong, you know what is wrong and what is right; don't you? A. Sure.

Q. And you know that regardless of who tells you and how far you went in school; isn't that right? A. It all depends on what they tell me, if I know whether it is right or not.

157 Q. You know what is right and what is wrong --

MR. DODSON: I object to his badgering the witness, if Your Honor please.

THE COURT: No. I think it is proper cross examination, to test the witness.

BY MR. FLANNERY:

Q. Isn't that right? A. Sure, I know right from wrong.

Q. And you know it is wrong for a white person to do something or for a colored person to do something; it doesn't make any difference what their color is; isn't that right? A. If it is wrong.

Q. If it is wrong, it is wrong. That is all.

MR. DODSON: That is all. You may step down.

(Witness excused.)

MR. DODSON: We rest, if Your Honor pleases.

MR. FLANNERY: The Government rests.

MR. DODSON: I have one prayer, if Your Honor please, which I would like to submit.

THE COURT: You may. Counsel approach the bench, please.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

THE COURT: The Court will not give this instruction. This instruction will be refused.

158 Let the record show that counsel for the Defendant tendered an instrument captioned, "Defendant's Instruction Number 1," and that the Court considered the Defendant's proffer entitled "Defendant's Instruction Number 1" ---

MR. DODSON: May I say, for the record, I am doing it on the basis of the McNabb decision, Supreme Court decision.

THE COURT: The Court marked the proffered instruction, "Refused"; and the proffered instruction is refused.

(Whereupon counsel resumed their places at the trial Table and the following proceedings were held in open Court:)

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179

COURT'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the Jury, the case upon which you are sitting as jurors is the case of the United States v. Milton Leo Mallory.

In these instructions, I shall at times refer to Milton Leo Mallory as the Defendant.

I shall now read to you the indictment of the Grand Jury in which is set forth the charge against the Defendant.

180

"The Grand Jury charges:

"On or about November 22, 1956, within the District of Columbia, Milton Leo Mallory carnally knew and abused a female child named Shirley A. Mallory, who was then under sixteen years of age, that is to say, about eight years of age."

You have heard the evidence and the statements and arguments of counsel for the prosecution and for the Defendant. It now becomes your duty to determine whether the Defendant is guilty or not guilty of the offense with which he is charged.

Before discussing the charge against the Defendant in detail, I shall first summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

It is the function and the duty of the Jury to determine the issues of fact. It is the duty of the Court to instruct you ladies and gentlemen of the Jury as to the principles and rules of law governing the case.

You are bound and obligated to follow the Court's instructions as to the law and to take the law from the Court. On the other hand, ladies and gentlemen of the Jury, you are the sole judges of the facts, and you must determine the facts for yourselves solely upon the evidence

presented at this trial.

181 The fact that a defendant is charged with a crime and has been indicted is not to be taken as any indication of his guilt. The sole purpose of an indictment is to bring a defendant before the Court. An indictment is merely the machinery and the procedure provided by law for placing a defendant on trial.

You will bear in mind this instruction as to the character and purpose of an indictment in connection with the specific instructions concerning the indictment in this case which the Court will give you later during the course of these instructions.

When the Defendant in this case was arraigned, he pleaded, not guilty. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to the Defendant throughout the trial.

Having given you the foregoing instructions as to the general principles of law, which you are to bear in mind, I shall now instruct you as to the particular offense alleged to be involved, and the specific law applicable to said alleged offense.

The Code of the District of Columbia, 1951 edition, Title 22, Section 2801, the laws of the District of Columbia in that Code, read as follows with respect to the offense of carnal knowledge. And I quote from said Code, Title 22, Section 2801 thereof:

182 "Whoever carnally knows and abuses a female child under sixteen years of age shall be punished as provided by law.

That is the end of the quote from the Code, the law. The Court goes on with the instruction.

The words "carnal knowledge" are synonymous with "sexual intercourse." In plain language, the crime of carnal knowledge may be defined as having sexual intercourse with a female child under sixteen years of age.

If the female child is under sixteen years of age, which is the age of consent in this jurisdiction, it is immaterial whether she did or

did not consent to the act. Having sexual intercourse with a female under sixteen years of age is a crime even if the female consents, because in the eyes of the law, she is incapable of consenting if she is under the age of consent.

In order to establish that the offense has been committed, the Government must prove beyond a reasonable doubt the following elements:

First, that the Defendant had sexual intercourse with the prosecutrix, the little girl. Second, that at the time of the intercourse, the prosecutrix, the girl, was under the age of sixteen.

183 If each of these elements is established beyond a reasonable doubt, the Jury may find the Defendant guilty. If one of these elements is not established beyond a reasonable doubt, the verdict of the Jury must be, not guilty.

The law does not permit a conviction on a charge of carnal knowledge on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required. Such corroboration, however, need not be by eye witnesses.

Eye witnesses can hardly ever be obtained in regard to such an offense as is charged in this case. Corroboration may consist of circumstances that corroborate the story of the prosecutrix.

Corroboration or lack of corroboration is a matter for you, the Jury, to determine from the evidence in this case.

Carnal knowledge comprises penetration of the sexual organ of the female by the sexual organ of the male. The slightest penetration is sufficient; but unless there is some penetration, there is no carnal knowledge.

You are instructed that if you find the Defendant guilty, the punishment provided by law may be either imprisonment for a term of years, or it may be the death penalty. The decision whether the death penalty should be inflicted is made by the Jury. The Jury has the authority to determine whether or not the death penalty should be inflicted in a rape case.

184 Consequently, if you find the Defendant guilty of rape, you must then decide whether the death penalty should be imposed. If you unanimously reach a conclusion that the death penalty should be inflicted, then you may add to your verdict of, guilty, the words, "with the death penalty." In such cases, if that is your verdict, it will then be mandatory on the Court to impose the death penalty.

On the other hand, if you find the Defendant guilty of rape, but do not reach a conclusion that the death penalty should be inflicted, then your verdict should be simply, guilty, without any addition to it. In that event, the Defendant will be subject to imprisonment for a term of years, but will not be subject to the death penalty.

If you find the Defendant not guilty of rape, then and in that event, your verdict will be, not guilty.

The burden of proof is on the Government to prove the Defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the Defendant has committed every element of the offense with which he is charged, the Jury must find him not guilty.

I said a moment ago that the burden is on the Government to prove the Defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or
185 mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself, and not just any whimsical speculation or any capricious conjecture.

Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence, you can say to yourself that you are not satisfied of the Defendant's guilt, then you have a reasonable doubt. On the other hand, if after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the Defendant's guilt, such as you would be willing to act upon in the more weighty

and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is proof which will result in an abiding conviction of the Defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the Defendant beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified, and take into account all the circumstances concerning which testimony has been introduced.

186 You are the sole judges of the credibility of the witnesses. In other words, you and you alone are to determine whether to believe any witness, and the extent to which any witness should be credited.

In reaching a conclusion as to the credibility of any witness, you may consider and weigh the testimony of said witness, consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of the case.

All of these matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in determining what witnesses to believe and to what extent to credit them.

If you find that any witness wilfully testified falsely to any material fact concerning which the witness could not, in your judgment, have possibly been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness, or any part of the testimony of such witness which you may see fit to disregard.

In this case, a written statement or confession signed by the Defendant has been introduced in evidence. I shall now instruct you as to
187 the law with regard to such statement or confession.

The law admits a confession in evidence if it is freely and willingly made. A person who is speaking voluntarily and when no influence is being

exerted upon him does not ordinarily admit that he has committed a crime unless that admission is true.

But the situation is otherwise if the confession or admission is obtained as a result of a promise, or by duress or by coercion, or as a result of any undue influence, or of any misrepresentation by the person or persons to whom the confession or admission is made.

If a confession or admission is obtained by these means, it must be rejected and disregarded by the Jury.

Consequently, members of the Jury, if you find that the Defendant's alleged confession and admission was made under duress, or as a result of coercion, or as the result of a promise, or as a result of an inducement, or a misrepresentation, you must disregard his confession and his admission.

Human experience has shown that persons may sometimes admit the commission of a crime they have not committed if they were acting as the result of an inducement or a misrepresentation or promise.

By duress or coercion, I do not necessarily mean physical force. The words "duress" and "coercion" include all mental or moral force.

188 Confessions obtained under such circumstances are unreliable; and if you find that the written statement which is in evidence in this case was actually made and signed by the Defendant, but that said statement was obtained under such circumstances of duress or coercion or inducement or misrepresentation or promise, you should take into account that situation in considering the written statement or confession.

In this case, you have heard the testimony of police officers. You are instructed that in weighing the credibility of these officers, as well as any other witnesses in the case, you should consider the interest which the witness might have in the result of the case. Where a witness has a direct, personal interest in the result, there is a strong temptation to color or pervert or withhold facts. This rule applies to the police officers as well as to all other witnesses in the case.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as

against the declarations of a lesser number which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side against the other.

189 It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

You are instructed that voluntary intoxication is not an excuse for the commission of a crime. The law does not recognize voluntary intoxication as a defense to a criminal charge.

The Court instructs you that if there is a conflict in the evidence in this case on any fact or circumstance tending to establish either the guilt or the innocence of the Defendant, a part of which is in favor of the theory of the Government, and a part of which is in favor of the theory of the Defendant, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence or the theory or the conclusion which is most favorable to the Defendant.

At times during the trial of this case, the Court has been called upon to make rulings on certain legal matters; that is, on questions involving law.

Rulings on questions of law are the concern of the Court solely. Your concern is solely with questions of fact, and with the application of the Court's instructions to the testimony and the other evidence in the case, as those instructions relate to your determination of fact.

190 Your verdict must not be influenced by the decisions on matters of law made by the Court during the trial, except as those decisions by the Court are reflected in the Court's instructions to the Jury.

Throughout the trial, the Court has made rulings on the question as to whether certain offered evidence might properly be admitted.

You are not to be concerned with the reasons for such a ruling by the Court, and are not to draw any inferences from them. Whether

evidence offered is admissible is purely a question of law for the Court's determination. In admitting evidence to which objection is made, the Court does not determine what weight should be given such evidence. A ruling by the Court permitting testimony to be given or other evidence to be introduced is not to be considered by you, the Jury, as any indication as to what weight said testimony or other evidence may or may not have. What weight is to be given to evidence is strictly a matter for you, the Jury, to determine for yourselves.

Nor does the Court pass upon the credibility of any witness who testifies. A ruling by the Court permitting a witness to testify or give evidence is not to be considered by you, the Jury, as any indication as to what the credibility of that witness may or may not be. The credibility of a witness is, likewise, a matter strictly for you, the Jury, to determine for yourself.

191 On the other hand, as to any offer of evidence that was rejected by the Court, you, of course, must not consider such evidence; and as to any question to which an objection was sustained, you must not conjecture or guess or speculate as to what the answer might have been, or as to the reason for the objection or for the ruling of the Court.

As I have already instructed you, ladies and gentlemen of the Jury, you are to determine the facts for yourselves solely upon the evidence presented at the trial.

Now, in this connection, you are instructed that statements or arguments by counsel, the attorneys for the Government and for the Defendant, statements and arguments by the lawyers are not evidence and are not to be taken or considered as evidence.

Arguments by lawyers are made to assist you in analyzing and appraising and evaluating the evidence, and are to be so considered and so considered only by you.

Every case is to be determined without bias, prejudice or sympathy for or against either side, and solely upon the testimony of the witnesses under oath, the evidence, and the Court's instructions as to the law.

You have now heard the Court's instructions. If in all these instructions from beginning to end any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must
192 be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others. But you are to consider all the instructions as a whole, to regard each in the light of all the others.

Now, ladies and gentlemen of the Jury, I want you to take this matter and consider it deliberately in the light of the instructions which I have given you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday lives.

The Court has read and explained to you the offense with which the Defendant is charged. It consists of one count. It is your duty to consider that count and to return a verdict on that count.

You will return one verdict. Your verdict may be either, guilty, or, not guilty; and, as you of course know, your verdict must be by unanimous vote.

Before commencing your deliberations, you will choose one of your number foreman. Whenever you shall have arrived at a verdict, notify the Marshal; whereupon you will be escorted back to the courtroom to return your verdict.

Before retiring to the jury room, the Court will ask you ladies and gentlemen of the Jury to remain in your seats long enough to enable counsel on either side, if they desire, to do so, to approach the bench.

193 Do counsel desire to approach the bench?

MR. DODSON: Yes, sir.

THE COURT: You may do so.

(Whereupon counsel approached the bench and the following proceedings were held out of the hearing of the Jury:)

MR. DODSON: I think, Your Honor, we are entitled to the instruction on the good character. We had the character witness.

THE COURT: Yes, you are right. I will give that instruction on character.

In order that that will be done strictly in accordance with the decisions, I will give it just as I normally give it.

MR. DODSON: It is satisfactory in every other respect.

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194 Ladies and gentlemen, there is one instruction the Court did not give; and it has been requested to be given.

The Court will now give it to you.

Ladies and gentlemen of the Jury, testimony has been given you touching the good character of the Defendant.

195 When a person is charged with a crime, the Court permits this question of good character to be introduced on this theory: If a man in the community where he lives has built up in the years of his life a character among his associates for good order, honesty and veracity, it is right that the Jury should know that fact, because of the generally-accepted proposition that one of good reputation is less likely to commit crime than one of bad reputation.

The testimony of character witnesses is a fact to be considered by the Jury, together with all the other facts and circumstances of the case in reaching the ultimate conclusion of guilt or innocence.

You are instructed that evidence of good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt as to Defendant's guilt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would, alone, create a reasonable doubt, although without it, the other evidence would be convincing.

If upon the whole evidence, including that of good character, you, the Jury, are satisfied beyond a reasonable doubt of the Defendant's guilt, it is your duty to return a verdict of, guilty.

On the other hand, ladies and gentlemen of the Jury, if upon the whole evidence, including the evidence of good character, there exists
196 in your minds a reasonable doubt of the guilt of the Defendant, then and in that event, your verdict should be, not guilty.

You will consider that instruction, ladies and gentlemen, together with all the other instructions the Court has given you.

You will now retire to deliberate.

(Whereupon at 11:45 a. m., the Jury retired to deliberate.)

THE COURT: Marshal, bring in the Jury.

(Whereupon at 3:54 p. m., the Jurors resumed their seats in the jury box:)

THE COURT: The Clerk will take the verdict.

THE CLERK: Will the Foreman please stand.

Mr. Foreman, has the Jury agreed upon a verdict?

THE FOREMAN: They have.

THE CLERK: What say you as to the Defendant, Milton L. Mallory?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your Foreman says that you find the Defendant, Milton L. Mallory, guilty as indicted, and that is your verdict, so say you each and all?

(The Jurors indicated in the affirmative.)

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,023

237

MILTON LEO MALLORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUN 9 1958

Joseph W. Stewart
CLERK

No. 14,023

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Whether, if properly preserved for appellate review, appellant's rights, afforded him by Rule 5 (a), F. R. Cr. P., were violated by the admission into evidence of oral and written confessions, and if so whether in the face of overwhelming proof of guilt—independent of the confessions—reversal is required?

2. Whether the Court properly instructed with respect to the nature of a confession?

(x)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,023

MILTON LEO MALLORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

On December 10, 1956, the Grand Jury returned an indictment charging appellant, Milton Leo Mallory, with carnally knowing and abusing eight-year-old Shirley A. Mallory, in violation of 22 D. C. C. § 2801 (J. A. 1). Upon his plea of not guilty appellant was tried by jury and convicted on April 9, 1957, as indicted (J. A. 2). On June 17, 1957, appellant received a sentence of imprisonment of from two to seven years (J. A. 5). The trial court denied appellant's alternative motion for judgment of acquittal or for a new trial (J. A. 3). On March 31, 1958, this Court by printed opinion, dissolved an order for appellee to show cause, and denied appellant's motion to remand.

A. The Crime

On November 22, 1956, eight-year-old Shirley A. Mallory attended the movies with her brother; left about 6:30 P. M. (J. A. 7) and, according to instructions, met her mother in

the vicinity of 1226 12th Street NW., rather than at her home, 1722 15th Street, Northwest (J. A. 14, 20). The child was then given permission by her mother, Mr. Wilma Littlejohn, to visit Shirley Mae Curtis, who lived across the street at premises 1223 (J. A. 7, 14, 23). Shirley Mae Curtis lived in the basement apartment at the latter address (J. A. 15) with appellant (as his common-law wife or girl-friend—J. A. 55, 60), and appellant's father. Mrs. Littlejohn is a sister of appellant's father and appellant's aunt. (J. A. 20-21.) The thirty-three year old appellant (J. A. 53) is a cousin to the eight-year-old child.

When the child-complainant arrived, Shirley Mae Curtis was bathing. After a brief conversation through the bathroom door the child-complainant left the basement, went upstairs to the first floor, intending to return to her mother. Meanwhile appellant, who had been sitting on a cot in a room of the apartment, "took the keys and went out the room." As the victim watched some children playing in the hallway, appellant grabbed her, pulled her into Apartment No. 3 (J. A. 29), pulled her panties down and, despite the victim's calls and screams, appellant had carnal knowledge of the eight-year-old girl. Upon completion of the crime, appellant gave his victim twenty-three cents, put her out of the room and remained therein. (J. A. 8-11.) The child immediately reported the incident to her mother, who had observed her adjusting her clothes as she left the premises and crossed the street. The victim's mother called the police. (J. A. 11-12, 20-21.)

Detective Byrd H. Hall of the Metropolitan Police Department received the call about 7:53 P. M.; arrived on the scene about 8:00 P. M. and found appellant lounging on a fence a few doors from the scene of the crime. Following arrest a search of appellant revealed the keys to Apartment No. 3 (27-28) and a pint of wine, half consumed. Appellant incoherent in speech, was sent to headquarters. (J. A. 31.) The detective, directed by the victim and accompanied by her mother, examined Apartment No. 3 where the crime occurred. The apartment was unoccupied, unlighted and immaculate except for newspapers in the sink. With the aid of a flashlight, the officer found several lumps of coal and appellant's cigarette

lighter at the very location of the crime. (J. A. 29-30.) The victim and her mother were then transported to the Women's Bureau and left with Policewoman Myra C. Wesley (J. A. 30).

Thereafter, the officer proceeded to the Sex Office at headquarters, prepared a line-up sheet, a prisoner's interview sheet, and briefly interrogated appellant regarding the offense and about his lighter found at the location of the crime. Appellant denied the crime (R. 73-74) and stated he had lost the lighter "some time ago". (J. A. 30). After tests for the presence of blood were performed on appellant's private parts, he was returned to the cell block until the following morning. The officer then went to the Women's Bureau, picked up the victim's slip, panties and medical report previously prepared by a physician at D. C. General Hospital (J. A. 30-31) where Policewoman Wesley had taken the victim for a physical examination (J. A. 26).

On November 23, the morning following appellant's arrest, about 9 A. M., Sergeants Sylvan Yuter and Charles A. Mackie read over the complaint and then talked with appellant (J. A. 32, 38). Within five or ten minutes appellant admitted intercourse with the child. He added that the act was performed without force; that the child had solicited him for twenty-five cents, and that he would not have performed the act had he not been drinking. (J. A. 32-33, 35, 39.) Neither of the officers, nor anyone in their presence, threatened appellant or made promises to him prior to or during his admissions (J. A. 32, 38). Although advised of his right not to make a written statement, and that if made, the statement could be used for or against him at trial, appellant willingly consented to give a written statement (J. A. 33, 39, 42). The statement was typed, read back, and signed by appellant. (J. A. 34, 39). Thereafter, when confronted by the eight-year-old complainant, appellant orally admitted the intercourse (J. A. 22, 34, 40).

Detective Mackie testified that appellant was arraigned before noon on the morning of the 23rd (J. A. 40). When asked why he had not taken appellant to a committing magistrate before the interrogation, Detective Yuter replied (J. A. 36): "Before I had an opportunity—before I gave the man an op-

portunity to tell me whether or not he was guilty or innocent?
 * * * That is not my procedure, Sir."

The results of the physical examination and laboratory tests performed on the child-complainant at D. C. General Hospital showed that male sperm were present in the victim's vagina and that she had recently had intercourse (J. A. 44-45). Tests performed by the F. B. I. upon the victim's slip and panties also revealed the presence of male sperm (J. A. 47).

B. The Trial

During the course of trial, appellant's cigarette lighter, and the victim's slip and panties—worn at the time of the crime—were introduced into evidence without objection (J. A. 45, 47). Following direct and cross-examination of the victim's mother, who testified as to appellant's oral admissions made upon confrontation on the morning of November 23rd, appellant asked that such testimony be stricken. Appellant's request was considered as an objection and overruled (J. A. 25). Although appellant did not object during the testimony of Detectives Yuter and Mackie with respect to the oral admissions—made prior to the written statement and subsequent confrontation—(J. A. 33, 34, 39), he objected to the admission of the written confession, introduced into evidence as an exhibit (J. A. 34). Appellant's signed confession was read to the jury and the Government closed its case (J. A. 48-49).

Testifying in his own behalf, *appellant* on direct examination supplied corroboration of time, place and circumstances, with respect to the victim's presence in the basement apartment and the lack of conversation with him; their having left the basement apartment at close intervals and their subsequent presence in the hallway near Apartment No. 3; playing children in the hallway, and his actual presence in the apartment where the crime occurred, wherein appellant's lighter was found (J. A. 56). Appellant testified that he left his apartment, filled the furnace with coal and went to Apartment No. 3 to drink, because his father (who was not home (J. A. 62)) didn't allow him to drink in the house; that he sat on his coat, finished the remains of a fifth of wine—by which time he was pretty high—and fell asleep; that after awakening, he walked around the block when he found that a friend

he intended to visit was not home. When arrested, he was "still high". Appellant further testified that if the child-complainant came into the apartment during his presence, he didn't see her. Appellant stated the interrogation at the scene of the crime and at the Sex Squad Office was of brief duration. He testified he signed the written confession because the police told him that the child had been examined at the hospital; that he knew he had performed the act and might as well say so, and that they "would go easy on me, if I said I did it". (J. A. 56-59). Appellant was not examined on his direct examination as to why he had made the oral confessions.

On cross-examination appellant again supplied corroboration with respect to the time, place and circumstances aforementioned (J. A. 62-63). He testified further that he has gone to church; that he knows right from wrong; that he knows it's wrong to have sexual intercourse with a little girl; that he lived with his girl friend in the apartment, but that he didn't drink in the apartment house, even in the absence of his father, because his father didn't allow it (J. A. 60, 61-62). Appellant admitted the fact that the keys found on his person at the time of arrest belonged to Apartment No. 3; that he had his cigarette lighter while there on the same evening of the crime, and that he knew the lighter was found by the officers. Appellant also admitted telling the officers that the child had propositioned or solicited him, but denied the truth of this statement. As an explanation for his testimony at trial, appellant testified that the police "told me I might as well say I did it; so *I had to tell them something.*" (Italics supplied) (J. A. 63.) Appellant reiterated that the police had told him no more than that the child had been checked at the hospital, "you had something to do with her. You might as well come on say you did *so it will go easy on you.*" (Italics supplied.) (J. A. 66.) Appellant admitted that he was told the nature of the charge against him; that he was asked if he "mind giving a statement"; that he was advised he didn't have to make a statement unless he desired; that if made, the statement could be used for or against him, depending upon its contents, and that after being typed, the statement, as given, was read to him, and he affixed his signature (J. A. 67-68).

The following isolated leading question asked by appellant's counsel on direct examination elicited the obvious answer (J. A. 69):

Q. Mr. Mallory, all of your bringing up down South, when white people tell you to do something, *you will do it won't you?*

A. Yes, sir. (*Italics supplied.*)

Upon recross examination appellant reasserted his ability to discern "wrong" regardless of by whom perpetrated (J. A. 70). This appeal followed.

STATUTE AND RULE INVOLVED

District of Columbia Code (1951 Ed.), § 22-2801 provides:

"Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

Rule 5, Federal Rules of Criminal Procedure, provides:

(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

SUMMARY OF ARGUMENT

Appellant waived appellate review of the admissibility of his confessions by failing to make timely objection to testi-

mony concerning his oral admission, made at the confrontation of the complainant and her mother, when appellant, in fact, had voluntarily given an oral confession within five minutes after interrogation commenced, and had reduced the latter to writing. Appellant also failed to make timely objection to evidence of his first oral statement. The record reflects that such failures were not due to inadvertence but planned strategy: to elicit denials, upon which to predicate an argument of misconduct of the police. Also, appellant's objection at trial to the written confession was not timely. The *Andrew Mallory* issue is not properly raised on appeal.

Assuming, *arguendo*, the questions are properly before the Court, the circumstances of the case indicate that appellant's confessions on the morning following his arrest were voluntarily given; that appellant was not the victim of prolonged interrogations for the purpose of procuring a confession upon which to sustain arrest and ultimately his guilt. After proper police procedure on the night of his arrest, appellant, in a half-drunk condition was permitted a night of uninterrupted sleep. Both "process of inquiry" and purpose therefor are absent in the record. Appellant's confessions were neither the result of an unnecessary delay nor were they obtained during such a delay within the meaning of Rule 5 (a), F. R. Cr. P. Indicative of the fact that appellant's confessions were voluntary is the fact that he signed the written confession after being advised of his rights.

Assuming the confessions were erroneously admitted, reversal is not required in the face of overwhelming proof of guilt, independent of the confessions.

Appellant's request for instruction, proffered apparently to accord with Rule 5 (a), was not preserved for appellate review. It was an erroneous statement of the law; was not in accordance with the facts; and for these reasons the court was not required to relate it to the jury. Nor was the court required to recast or modify the erroneous instruction. The court properly instructed upon the weight to be accorded confessions.

ARGUMENT

I

Appellant's oral and written confessions were properly introduced into evidence. In any event, proof of guilt is overwhelming without the confessions

Relying principally upon Rule 5 (a) of the Federal Rules of Criminal Procedure, the *McNabb* case¹ the so-called *Andrew Mallory* rule,² and *Upshaw v. United States*,³ appellant contends that his "confession" obtained during an alleged illegal detention was improperly admitted into evidence (Br. 2, 4, 5, 13, 15). For reasons shown more fully hereinafter, it is submitted that the question is not properly before the Court and the substantive contention is without merit.

A. Appellant failed to make timely objection at trial

The record is barren of a pre-trial motion to suppress either appellant's written confession or his oral confessions given both prior to the written confession (J. A. 32-33, 38, 39) and subsequent to the written confession (J. A. 40). Moreover, appellant failed to seek a hearing outside of the jury's presence with respect to either of the confessions. Of even greater significance is the fact that appellant failed to object to the admissibility of Mrs. Littlejohn's direct testimony concerning appellant's oral admissions—made at the confrontation subsequent to the written confession—on the morning following his arrest (J. A. 21-22). Not until after cross-examination had been completed in the jury's presence did appellant seek to object in the form of requesting to have the testimony stricken (J. A. 24).

Similarly, objection to the direct testimony of Detective Yuter (with respect to appellant's oral admissions given prior and subsequent to his written confession) was also withheld (J. A. 32-33, 38-39, 40). Appellant then made a bare objection when appellant's written confession was offered for identification. Cf. *Smith v. United States*, C. A. D. C., No.

¹ 318 U. S. 882 (1943).

² *Andrew Mallory v. United States*, 354 U. S. 449 (1957).

³ 335 U. S. 410 (1948).

14,126 (decided March 27, 1958). Slip op. p. 14. When counsel for appellant declined an invitation for a bench conference, the court noted an objection and ordered appellant's written statement received into evidence (J. A. 34).

By the time of the latter objection, appellant had already laid the ground work for the strategy of his principal defense—alleged misconduct of the police—for prior thereto he had cross-examined Mrs. Littlejohn, a layman from South Carolina, with respect to the police (J. A. 23-25). Apparently, failure to object to Mrs. Littlejohn's detailed testimony concerning appellant's oral confession was not an oversight. Had it been timely made and ruled upon favorably to appellant, opportunity for cross-examination thereon would not exist. To say that the motion to strike the testimony following appellant's cross-examination of the witness was adversely decided does not alter the situation. The information desired by appellant had already been communicated to the jury.

It is well established that failure to object to the admissibility of statements made during an alleged illegal detention bars appellate review. *Gilliam v. United States*, C. A. D. C., No. 13,956 (decided April 24, 1958), and cases there cited. It is apparent that such a failure may result not only from inadvertence but also pursuant to trial strategy. See *Perry v. United States*, — U. S. App. D. C. —, 253 F. 2d 337 (1957), *Lawson v. United States*, 101 U. S. App. D. C. 332, 248 F. 2d 654 (1957).

There is no contention here that appellant's failure to timely object to the oral admissions testified to by Mrs. Littlejohn and Sergeant Yuter were due to inadvertence. The type of cross-examination conducted of the witnesses and appellant's argument to the jury indicate that appellant desired a foundation upon which to predicate a defense of police misconduct. Since Mrs. Littlejohn and the officers had heard and/or knew of appellant's denials of the crime, appellant desired the jury to hear that aspect of the extrajudicial statements, and felt that "the whole of what was said was thought to be helpful to the defendant." *Lawson v. United States*, *supra* (n. 1).

Upon this record the propriety of the admissibility of either of the confessions is not properly before the Court. Appel-

lant's failure to timely object upon first opportunity is a waiver of the objection.

Assuming, *arguendo*, appellant's bare objection to *identification*, notwithstanding conduct of waiver as to the oral confessions, could preserve review as to the written confessions, no prejudice results to appellant. The account of appellant's oral confessions admit of no distinctions, when compared with his written confession.

Moreover, decades ago the Supreme Court solidified the doctrine that, unless no opportunity presented itself, an objection to the admissibility of evidence, allegedly seized in contravention of a *constitutional right* must be made prior to trial. *Segurola v. United States*, 275 U. S. 106, 111-112 (1927). This Court has had occasion to apply the doctrine. See *Cromer v. United States*, 78 U. S. App. D. C. 400, 142 F. 2d 697 (1944), cert. denied, 322 U. S. 760; *Smith v. United States*, 72 App. D. C. 187, 112 F. 2d 217 (1940), cert. denied, 311 U. S. 663. In *Segurola, supra*, the Supreme Court also held that the defendant's failure to object *prior to the actual introduction of the evidence* "was too late." 275 U. S. at 112. In the instant case there was no pre-trial objection to appellant's confessions, including his written confession. In addition, appellant did not object until *after* evidence of his oral admission was before the jury and he had completed cross-examination of the witness. The doctrine which bars appellate consideration with respect to evidence allegedly obtained in violation of a *constitutional right*, *Segurola, supra*, is applicable here, where only a procedural rule is concerned.

Thus, because of the lack of timely objection—whether for strategy or otherwise—the question is not preserved for appellate review.

B. The confessions were admissible

In effect, appellant contends that his first oral confession—given about 9 A. M. following his arrest about 8 P. M. on the previous night, after appellant had benefited from a night's sleep in the precinct—was obtained during an "unnecessary delay" (Br. 8-9).⁴ Appellant also apparently contends that

⁴As indicated in the previous argument, testimony at trial concerning the oral confession given about 9 A. M. was not elicited until after Mrs.

his confession was a *result* of the alleged illegal detention (Br. 4). Precinding from the procedural aspects and trial strategy aforementioned, it is clear from cases relied upon that appellant's confessions were neither given during an unnecessary delay, nor were they the product of any delay. A mere recitation of hours or minutes elapsed between arrest and arraignment is not sufficient to demonstrate a violation of Rule 5 (a), F. R. Cr. P. The Rule is a legislative enactment requiring law enforcement officers to bring an accused before a committing magistrate "without unnecessary delay." In interpreting the rule, the Supreme Court said in *Andrew Mallory v. United States*, 354 U. S. 449, 455 (1957):

"The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that *the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for extraction of a confession.*" (Italics supplied.)

Thus, in explicit language the Court made it quite plain that an immediate preliminary hearing is not required under the Rule. Nor does it preclude questioning by the police. The prohibition commanded in *Mallory, supra*, was stated at 354 U. S. at 454:

". . . he [the arrested person] is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

In affirming a conviction in the most recent *Trilling*,⁵ cases, this Court in its majority opinion construed the Supreme Court's holding in *Andrew Mallory*, thusly, (Slip op. pp. 2-3):

Littlejohn had testified to appellant's confession made at the confrontation, held immediately after the written confession.

⁵ *Trilling v. United States*, C. A. D. C., Nos. 13069, 13165, and 13212 (decided April 17, 1958).

As there applied, Fed. R. Crim. P. 5 (a) seems to permit differing results in varying situations. It is not simply a matter of hours, one way or another, but of *police purpose and conduct* in the light of *circumstances*. (Italics supplied.)

Hence, a determination of "unnecessary delay" and consequent illegal detention requires examination and consideration of all the relevant facts and circumstances of each case.

The *facts and circumstances* of the instant case are comparatively simple. When placed in proper perspective they fail to indicate that appellant's confessions were obtained during an "unnecessary delay" or they were the "fruit of wrongdoing" on the part of the police. Cf. *Upshaw v. United States, supra*. The pertinent facts and circumstances show that appellant was arrested about 8 P. M. upon ample "probable cause" to believe that he had committed carnal knowledge—even rape; that at the time of his arrest this holiday—Thanksgiving Night—he was "still high" and incoherent; that after brief interrogation, appellant was taken to headquarters and the arresting officer remained at the scene *investigating the complaint* of rape made by the eight-year-old child. After taking the complainant and her mother to the Women's Bureau—so that a police woman could assist in verifying the child's story by obtaining a medical examination—the arresting officer joined appellant at headquarters. Appellant was questioned about the offense and the presence of his lighter at the scene of the crime. The officer also prepared a prisoner's interview sheet and a line-up sheet. After appellant was given tests to ascertain the presence of blood on his person, he was placed in his cell for the night.

Up to this point, appellant does not specifically contend that his arrest was without ample "probable cause". Nor does he specifically contend that "unnecessary delay" had ensued. In any event, the record belies such contentions. The child's version of the rape is sufficient to establish "probable cause". Case authority in addition to *Andrew Mallory supra*, is not required to support the proposition that the above-stated police procedure was reasonable and proper. Nevertheless, appellant contends that Detective Hall's statement to the ef-

fect that the appellant was taken to headquarters "for further investigation of the complaint" (J. A. 29) means "secret interrogation which Rule 5 bars" (Br. 9.) Appellant misconstrues the officer's phrase to mean "investigation" of appellant (Br. 12). However, the record does not support or permit such misconstruction. The *purpose* of the officer's investigation is clear—to investigate the *complaint*, not appellant. The record reflects that the *complaint* was in fact investigated at the scene and by medical examination of the victim. The results of each, indeed, verified the complaint.

The record militates against a contention that this *conduct* of the officer was for the *purpose* of extracting a confession. For appellant himself indicated during his testimony that questioning at the scene and at headquarters was brief (J. S. 58, 65-66). To say that the incoherent (J. A. 31), still-high (J. A. 58) appellant was placed in the cell to sleep, for the *purpose* of extracting a confession is unrealistic and overlooks the fact that appellant was not disturbed during his sleep. He did not contend otherwise at trial, nor does he do so on appeal (Br. 12, 13, 15). To permit appellant uninterrupted sleep on the night of a holiday in his at least half-drunken condition, after verification of the complaint was obtained is not unreasonable conduct. Arraignment at this stage was simply not feasible.

Similarly Sergeant Yuter's statement, to the effect that it was not his procedure to arraign a defendant until the latter had an opportunity to express his innocence or guilt admits of no improper conduct. The statement must be viewed in the light of the circumstances when made. It is significant that the officer's expression of his procedure could have no adverse affect upon the voluntariness of appellant's first oral confession, in reducing his oral confession to written form and in the confrontation where appellant again was a willing penitent.

What was previously said concerning the conduct of the arresting officer on the night of appellant's arrest is equally applicable to the conduct of the police on the following morning. For following appellant's sleep he voluntarily confessed within five or ten minutes after questioning begun at 9: A. M. (J. A.

32, 38). When fairly construed the record reflects that appellant immediately confessed when informed that the eight-year-old victim had been examined at the hospital and that he might as well admit the act he knew he had perpetrated (J. A. 58). The time which elapsed between 9:13 A. M. and 9:32 A. M. when the oral confession was reduced to writing, and at the subsequent confrontation by the complainant and her mother, appellant's, relatives, has recently been determined to be "without unnecessary delay". *Blackney v. United States*, C. A. D. C., No. 13,744, decided May 1, 1958; *rehearing en banc denied*, June 5, 1958.

Appellant's suggestion of an involuntary confession of course was a question for the jury. The alleged promise and suggested fear were the product of leading questions. On direct examination the following transpired (J. A. 58):

Q. You saw what has been introduced as Government's Exhibit No. 6, which was this alleged confession. Did you sign that paper?

A. Yes, sir.

Q. Will you tell the Court and this Jury why you signed it?

A. *I signed it because they asked me to sign it.*

Q. Now, what did he say to you that made you feel that you had to sign that paper?

A. Well, he told me that morning to start with, he told me * * * *said that they had carried the girl over and had a check; and told me * * * and said that I know I did it, and might as well go ahead and tell them I did it.*

Q. What else did they say? Did they make any promises to you at that time?

A. Told me if I signed it, he would go easy on me, if I said I did it." (Italics supplied.)

Thus it took more than one question, more leading by degrees, to elicit the alleged promise on direct examination. Compare the foregoing with appellant's statement on cross-examination, when asked why he confessed (J. A. 63):

Q. You told the police, though, that she said something to you?

A. I know I did. They told me I might as well say I did it, *so I had to tell them something.* (Italics supplied.)

Similar to direct examination, on redirect examination of appellant, the following occurred (J. A. 69):

Q. Mr. Mallory, all of your bringing up down South, when white people tell you to do something, *you will do it; won't you?* (Italics supplied.)

To this appellant yielded, "Yes, sir." With all the opportunity for the statement to have been volunteered on direct examination, but especially cross-examination, appellant did not respond with *fear* as a reason for his confessions. In any event, an examination of the entire testimony given by the officers and appellant or of appellant's testimony alone, reveal that the confessions were but those of a willing penitent, who knew right from wrong. Indicative thereof, appellant admits he signed the typed confession after being advised that the confession could be used for or against him (J. A. 67-68).

The circumstances of the instant case do not indicate police *conduct* which show even a *process of inquiry*. Circumstances such as undisturbed sleep could not lend itself to eliciting damaging statements. The command of Rule 5 (a) and *Andrew Mallory, supra*, are not violated.

In denying appellant's motion to remand⁶ this Court reviewed the pertinent facts and circumstances and held appellant's confessions were properly admitted into evidence. The analysis and conclusions were thus (Slip opinion p. 3-4):

"There is no evidence of prolonged or intensive questioning. Mallory agrees he was "pretty high" on wine when he was arrested and that the questioning that night was cursory. He agrees that the next morning the officers simply told him the child had been checked at a hospital and he might as well admit the act, and that he

⁶ Milton Leo Mallory v. United States, C. A. D. C., No. 14,023, decided March 31, 1958.

at once admitted it. He agrees that he made the recitation to the group of women. There seems to us to have been no unnecessary delay in arraignment. The arrest was made somewhere around eight o'clock in the evening on a holiday. The arrested man was drunk, or nearly so. He was arrested on a small child's story, and even though the hour was late the officers checked her story by medical examination. Anyone familiar with hospital procedure knows these things take time."

The Court then examined three possible contentions for "unnecessary delay" and arrived at the following conclusion (Slip opinion p. 4):

"The only way we see to find unnecessary delay in this case would be to hold (1) that the half-drunken man should have been forthwith arraigned, even though he could not have pleaded intelligently, or (2) that the child's story should not have been checked, or (3) that Mallory must have been arraigned at midnight. Even then, such a holding would have to be made in the face of the facts (a) that no prolonged questioning took place at any time and (b) that Mallory was warned before he signed a statement. We think neither the decision of the Supreme Court in the *Andrew Mallory* case, *supra*, nor this matter [require such a holding]."

Subsequent to adversely deciding appellant's motion to remand, *Trilling, supra*, was decided. There a majority of this Court held that a confession given three hours after a valid arrest upon ample "probable cause", and one hour after prior denials was properly received into evidence, albeit the defendant was not arraigned until about ten hours after arrest. The reasoning employed by the Court under the *circumstances* of that case was that the defendant "was not taken to headquarters to be subjected to a process of inquiry. He was not taken there for the purpose of extracting a confession." The same reasoning dictates the admissibility of appellant's confessions. See also facts in brief in *Kidd v. United States*, — U. S. App. D. C. —, 242 F. 2d 38 (1957). Suffice it to add, the circumstances of this appellant's case can not be compared with the

purpose and conduct in *Andrew Mallory, supra, Upshaw, supra, McNabb, supra, or Watson*,⁷ wherein extended interrogation and other conduct were deemed necessary to support the arrests and ultimately the defendants' guilt.

Finally, evidence in the instant case supports the conviction, even if the written and/or oral confessions are omitted. The eight-year-old victim clearly related the account of a forcible rape—pure and simple—perpetrated by appellant in Apartment No. 3 of 1223 12th Street, Northwest, only one flight from his basement apartment (J. A. 8–11). The child's testimony remained unshaken on cross-examination (J. A. 13–19). The medical report and an analysis of stains on the victim's slip and panties corroborate the fact that the intercourse was recent. In addition to irritation in the vagina, the examinations showed male sperm in the vagina and on the child's clothing. (J. A. 44–45, 47.) The child's mother corroborated the circumstances that upon leaving the unforgettable premises, the victim was still trying to adjust her clothes (J. A. 11–12, 20–21).

In addition to the foregoing, appellant himself, upon his direct and cross-examination, supplied corroboration of time, place and circumstances (J. A. 56, 62–63). Moreover, keys to the apartment were seized from appellant at the time of arrest (J. A. 28), and his cigarette lighter and lumps of coal were found at the exact location of the crime (J. A. 29). Appellant admitted having possessed the keys, having shoveled coal before going to the apartment, having had his cigarette lighter while there, and having had knowledge that the police had found it (J. A. 62–63), although he had denied losing his lighter on the night of the crime (J. A. 30).

The only affirmative evidence offered by appellant at trial to controvert forcible rape was his denial (J. A. 57–58), and the testimony of Mrs. Hagler's dogmatic assertion that appellant was not at home (J. A. 51). However, Mrs. Hagler's testimony was diametrically opposed to the testimony of appellant, who not only admitted he was home, but admitted to all the victim testified, except the crime and its surrounding circumstances (J. A. 8–11, 56, 62–63). Not only would Mrs. Hagler's

⁷ *Watson v. United States*, — U. S. App. D. C. —, 249 F. 2d (1957).

testimony be impeached by the aforementioned, but her character testimony is likewise of no weight. Failing to establish Mrs. Hagler knew appellant's reputation in the community, he sought to establish reputation from "the church" community, which response was personal (J. A. 52). In addition, the minister called to establish appellant's reputation in "the church" could not qualify and was abandoned (R. 117).

Absent anything else in the record, only one conclusion appears—proof of forcible rape was overwhelming. For unlike *Mallory*, *Watson*, *McNabb* and *Upshaw*, *supra*, the conviction of this appellant, Milton Leo Mallory, did not depend upon confessions. Rather than being prejudicial to appellant, the willing penitent's confessions constituted the only affirmative evidence which could negate forcible rape. The Government therefore is responsible, not for prejudice, but for the absence of a recommendation of the death penalty (J. A. 81). Although the prosecutor did not seek the death penalty (R. 165, 166) the court properly instructed thereon (J. A. 73-74).

In summary, it is apparent that appellant's request to the jury to believe he did not perpetrate this vicious crime was rejected in the face of positive proof, established by the Government beyond a doubt, and corroborated in many respects by appellant. There is no reason to disturb that judgment. Cf. *Krulewitch v. United States*, 336 U. S. 440, 445 (1949); see *Kotteakos v. United States*, 328 U. S. 750, 764 (1946); *Woods v. United States*, 99 U. S. App. D. C. 351, 354, 240 F. 2d 37 (1956); *Lampe v. United States*, 97 U. S. App. D. C. 160, 229 F. 2d 43 (1956); *Caldwell v. United States*, 95 U. S. App. D. C. 35, 37, 218 F. 2d 370 (1954); *Campbell v. United States*, 85 U. S. App. D. C. 133, 176 F. 2d 45 (1949). See also, *Schowers v. United States*, 94 U. S. App. D. C. 374, 377, 215 F. 2d 764, 765 (1954); *Tyler v. United States*, 90 U. S. App. D. C. 2, 8-9, 193 F. 2d 24 (1951), *cert. denied*, 343 U. S. 908.

II

The jury was properly instructed

Appellant asserts the court erred in refusing his proffered instruction to the effect that if the jury found appellant had

not been arraigned "at the earliest opportunity" and that such "aided the police in obtaining the confession," then the confession must be disregarded "as having been obtained in violation of law and in violation of the defendant's constitutional rights" (Br. 14). This contention is untenable for several reasons. First, it overlooks the fact that the court fully and properly instructed upon the law with respect to the voluntariness of a confession received into evidence (J. A. 75-76). Upon a conclusion of the courts complete instructions, which embodied all the essential questions of law (J. A. 71-79) appellant requested an instruction upon character evidence, which was subsequently given (J. A. 80-81) and announced, "It [the complete charge to the jury] is satisfactory in every other respect." Under such circumstances, appellant is precluded from raising the issue on appeal. Rule 30, F. R. Cr. P., *Villaroman v. United States*, 87 U. S. App. D. C. 240, 184 F. 2d 261 (1950) (reversed on other grounds).

It is also apparent that appellant's requested instruction is not a proper statement of the law. And no authority is cited therefor. "Without unnecessary delay" has never been construed to mean "at the earliest opportunity". Nor is the phrase "aided the police in obtaining the confession," standing alone, without ambiguity. True it may mean "as a result of illegal detention", but it could also mean simply, "after any detention." *Andrew Mallory v. United States*, *supra*, eliminating mechanical or automatic obedience does not require the instruction. It is equally clear that Rule 5 (a) is a procedural rule of evidence, *United States v. Mitchell*, 322 U. S. 65, 66 (1944), wherein Congress did not issue a mandate of exclusion, *id.* at p. 67, or imply an instruction in Rule 5 (a) as in the statute concerned in *Bruno v. United States*, 308 U. S. 287 (1939). Moreover, *Brown v. Allen*, 344 U. S. 443 (1956) leaves no doubt that "the federal rule does not arise from constitutional sources." *Id.* at p. 476.

That a court is not required to give such an erroneous instruction or even to recast or modify the erroneous or misleading instruction is quite clear. *George v. United States*, 75 U. S. App. D. C. 197, 201, 125 F. 2d 559, 563 (1942); *Jackson v. United States*, 48 App. D. C. 272, 275 (1919). Neither the

facts nor the law involved herein would justify giving the proffered instruction. Ergo, appellant's contention must fail under well established procedural and substantive law.

A study of the record reveals that appellant was ably defended, fairly tried and justly convicted upon a merciful verdict. No apparent reason exists for reversing the judgment of the jury.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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